84-1308

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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1984

FREEMAN (TEEK) BOSLEY, JR., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis,

Petitioners,

v.

SHIRLEY BARNES, FRANCES J. McELROY, and MURRELL THOMAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the lower courts, in public employee discharge cases, must examine whether or not the government used the least restrictive means to achieve its legitimate goal, or, has this Court, in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980) foreclosed this examination and struck an automatic standard of review?

2. Whether a public employee, who has alleged that his discharge was because of political affiliation must establish that his political affiliation was the "sole motivating factor" or simply a "substantial motivating factor" in the reason for his discharge?

3. Whether the lower court must make a case-by-case examination under Pickering v. Board of Education, 391 U.S. 563 (1968) of the government's interest in First Amendment cases?

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Missouri is reported at 568 F.Supp. 1406 (E.D. Mo 1983). The opinion of the Court of Appeals for the Eighth Circuit is reported at 745 F.2d 501 (8th Cir. 1984).

JURISDICTION

The judgments of the Court of Appeals for the Eighth Circuit were made and entered on September 27, 1984 and copies thereof are appended to this petition in the Appendix.

Petitioners' request for Rehearing and Rehearing en banc were denied December 14, 1984 (4 judges would have granted the rehearing, 5 judges not reporting). The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES, INVOLVED

The pertinent portions of the First and Fourteenth Amendments as cited below, and as set forth in 42 U.S.C. Section 1983.

U.S. CONSTITUTION AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

U.S. CONSTITUTION AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

proceeding for redress.

STATEMENT OF THE CASE

This case arises under the First and Fourteenth Amendments to the Constitution. Petitioner, Freeman Bosley, Jr. was elected to the office of Clerk of the Circuit Court of the City of St. Louis (clerk's office) Missouri in November 1982. Respondents are three former employees of the clerk's office terminated by Petitioner Bosley, January 3, 1983.

Freeman Bosley, Jr. defeated several democratic candidates, including the incumbent Clerk Joseph P. Roddy, in the democratic primary for Clerk of the Circuit Court in August, 1982, and was elected Clerk of the Circuit Court after defeating the Republican opponent Lee

Sutterfield on November 3, 1982. Bosley's campaign platform and promise to the electorate was to bring sound management and efficiency to the troubled clerk's office. Bosley, established a transition team composed of both his supporters and those of the opponents that interviewed employees and studied the internal operations of the clerk's office.

The transition team identified several key areas in the clerk's office, which employs over 200 people, that needed improved management. The transition team, after interviewing over forty employees, recommended that Bosley not re-appoint four employees: Thomas Bauer, legal advisor and Respondents Francis McElroy, Murrell Thomas, and Shirley Barnes. Bosley interviewed each

respondent for approximately forty minutes in his office and later decided to terminate the four employees. Before making this decision, Bosley examined all of the Unit Manager and Administrative Assistant positions. Leaving in tact all other Managers and Administrative Assistants including those who opposed his election, and those who supported clerk Roddy.

Thereafter, McElroy, Thomas and Barnes filed suit against petitioners Bosley and Carter alleging that their termination was because of their political affiliation with the past democratic clerk, Joseph P. Roddy.

Respondent Francis McElroy, Unit Manager II was a non-civil service employee hired under the patronage system of hiring in November, 1963. His position was Manager of Operations which

reported directly to the Circuit Clerk. He was responsible for several key departments in the clerk's office. McElroy was affiliated with the former clerk's 17th ward organization[1].

Elroy's departments had many serious problems. He was terminated because he failed to make recommendations that could be implemented to solve the problems in these departments and because of his inability to make effective policy recommendations.

The job description for Unit Manager II requires that the employee hold a Bachelor's degree in business, or public

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[1]The City of St. Louis is organized politically into wards. A ward is a unit covering a proscribed geographic section of the city from which representatives are elected to the city's Board of Aldermen, and within which the Democratic and Republican parties have organized.

administration, or have related experience, and have knowledge of management techniques, and modern principles and practices of public administration. McElroy had only a high school diploma with no managerial experience outside the clerk's office. Bosley's replacement for McElroy was Mr. Charles Hoehn, campaign manager for an opponent for the clerk's, office who holds a Bachelors degree, and a Masters in Urban Planning. Mr. Hoehn also has over five years experience in public administration and management consulting.

Respondent Murrell Thomas, Administrative Assistant/Courtroom Clerk III, was a non-civil service employee, whose political affiliation was with the former clerk Roddy. He was Administrative Assistant to the clerk for four years. Two weeks before petitioner,

Bosley assumed his duties (after the election), clerk Roddy demoted Thomas to the position of Courtroom Clerk III a non-policy making position. As Administrative Assistant, Thomas, met with the public on the clerk's behalf, frequently accompanied the clerk to meetings with politicians and assisted the clerk generally.

Thomas had one and one-half years of junior college. Petitioner Bosley replaced Thomas with Frank McGhee who holds a Bachelors of Science in Business Administration with five years experience as a management consultant and experience in management systems, procedure and design.

Respondent Shirley Barnes, Unit Manager II was a non-civil service employee. Barnes reported both to the Circuit Clerk and George Solomon, Unit

Manager III as Unit Manager in charge of approximately ten departments supervising approximately forty-five employees.

Bosley identified a number of problems in Barnes' division, including the loss of court files. The transition team also made an assessment of Barnes' work potential. It was also found that there was a duplication of effort in Solomon's Unit Manager III and Barnes' Unit Manager II position. Thus Bosley eliminated the Unit Manager II position and all responsibilities for managing the various departments was delegated to Solomon, Unit Manager III, who was retained from the past administration, and who had opposed Petitioner Bosley's candidacy.

The improvement of the clerk's office required implementation of sophisticated computer systems and

management techniques. The District Court recognized and admitted that the replacements were "better qualified", however on July 27, 1983 it entered judgment for Respondents Barnes and McElroy on the First and Fourteenth Amendment claims that their termination was based on party affiliation, in favor of appellants on Respondent Murrell Thomas on all his claims and against all the Respondent on the Due Process and Sections 1985, 1986 claims.

On Appeal, a divided panel of the Court of Appeals for the Eighth Circuit affirmed the First and Fourteenth Amendment claims under 42 U.S.C. Section 1983 (Bright dissenting), reversed the decision of the District Court as to Respondents Murrell Thomas, and affirmed the judgment for Petitioners on the due process and Sections 1985 and 1986

claims.

On the issues raised under the First and Fourteenth Amendments relating to respondents political affiliation, the court reviewed the decisions of Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel, 445 U.S. 507 (1980) and Perry v. Sindermann, 408 U.S. 593 (1972).

The majority of the court ruled out the use of the Pickering compelling interest test set forth in Pickering v. Board of Education, 391 U.S. 563 (1968) which examines the interest of the public employee and the government's interest in promoting the efficiency of the public services it performs in political affiliation cases, Barnes v. Bosley, 745 F.2d 501 (8th cir. 1984). The court held that a balance was automatically struck in Elrod, supra, that political affiliation is always protected unless

the employee occupies a position that requires a political viewpoint in harmony with that of his/her supervisor. Barnes, supra at 506. The court also stated that Elrod was clarified by Branti, as Branti proscribed the proper inquiry to be whether a political affiliation is an appropriate requirement for the position not whether the position itself is confidential or policymaking in nature. Barnes, supra at 506.

The court upheld the District court's finding for the respondents but instead of a "sole motive finding", found that their political affiliation was the motivating factor in their dismissal, and that political affiliation was not important to the positions held. Barnes supra at 507. The court reversed the judgment against Thomas, stating that the

only factor which distinguished Thomas' case from that of the respondents' was that he was transferred to a predominantly ministerial position from his position as second in command to the previous clerk, just before Bosley took office. Id at 508.

Dissenting Judge Myron H. Bright of the Eighth Circuit Court of Appeals noted the "important" governmental interest of efficent public administration, and the use of the least restrictive means in the instant case, and found considerable differences between this case and Elrod and Branti.

EXISTENCE OF PROPER JURISDICTION BELOW

The District Court for the Eastern District of Missouri had jurisdiction over these constitutional claims pursuant

to 42 U.S.C. Section 1983 and 42 U.S.C. Sections 1985 and 1986.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Court's review is requested to clarify the conflict and uncertainty among the circuits and to review the grave constitutional dimensions of how the Eighth Circuit decisions on which now impedes the electorate from achieving better government. The problems before this Court is the appropriate analysis that should be applied in First Amendment cases where efficient and effective administration of public agencies requires the discharge of ineffective, less qualified employees, specifically by addressing: (1) the important governmental interest in using the least restrictive means to attain efficient and

effective government; (2) the burden of proof in public employee discharge cases, whether the "sole motivating factor" or the "substantial motivating factor" test must be established by the plaintiff; (3) the case-by-case approach to First Amendment cases that requires the application of the Pickering compelling state interest test.

In First Amendment cases, the burden is initially on the plaintiff to show that a constitutionally protected right has been violated by the defendant. Depending upon the circuit in which the suit is filed, a plaintiff may be required to show that the First Amendment protected right serves as the "sole basis" for the discharge or transfer of the plaintiff, see Elrod v. Burns, 427 U.S. 347 (1976), Branti v. Finkel, 445

U.S. 507 (1980); Bever v. Gilbertson, 724 F. 2d 1083 (4th Cir. 1984) and Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980) or may instead be required to show a lesser standard that the protected conduct was simply a "substantial" or "motivating" factor in the discharge. See Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 214, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1974); Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984); Nekolny v. Painter supra 653 F.2d 1164, 1168, Wren v. Jones, 635 F 2d. 1277 (7th Cir. 1980) cert. denied, 454 U.S. 832, 102 S.Ct. 129, 70 L.Ed. 2d 110 (1981),and Landry v. Farmer, 564 F.Supp. 598 (D.C. R.I. 1983).

After it is established that there has been a violation of a constitutional right, the court must then decide, on a

case-by-case basis, by applying the Pickering compelling state interest test, which requires that the employee's First Amendment right and the government's interest in efficient and effective government be examined to determine whether the government's interest outweighs the First Amendment right, and whether the least restrictive means was employed by the government to achieve the desired result Pickering v. Board of Education, 391 U.S. 563 (1968).

In the case at bar, the Eighth Circuit Court of Appeals below refused to apply the Pickering compelling state interest test even though the evidence presented established that the least restrictive means were employed as only four of the highest level employees out of 220 employees were discharged. The

Court concluded that Pickering did not apply in political affiliation cases because this Court struck an automatic balance between the government's interest in efficient management and the public employee's interest in free political association in Elrod. Barnes v. Bosley, supra at 506. The least restrictive means, as well as the governmental interest in efficient and effective administration, and the corresponding important public policy for the elimination of waste in government have been given less than cursory treatment by courts applying these cases. See Barnes v. Bosley, supra at 507 and Bever v. Gilbertson, 724 F.2d 1083 (7th Cir. 1984).

The proper role of the "sole motivating factor" test in First

Amendment cases remains unclear, particularly what criteria determines that the plaintiff has met this burden, and whether the basic "motivating" or "substantial" test is more appropriate.

The uncertainty and vagueness of the law in First Amendment public employee discharge cases is complicated by the various interpretations of Elrod, Branti, Pickering, Mt. Healthy and Connick prevalent among the circuits. Today, cases affecting the public's interest in efficient and effective public administration are being tried where there is overwhelming confusion in the law as to which test should be applied: (1) must the plaintiff show that the discharge was the "sole basis" or simply one of many as a "motivating factor" in the discharge?; and, (2) will the

Pickering balance test be applied at all to properly assess the government's interest? The answers to these questions will vary from one circuit to another. The government's discharge of an employee in Texas is subjected to different analysis and standard than an government's discharge of an employee in Virginia. See Tanner v. McCall, supra, and Bever v. Gilbertson, supra. Or, as in this case, the outcome may depend upon whether the case was filed on the west or eastern sides of the Mississippi River. See Barnes v. Bosley, supra and Wren v. Jones, supra. Important interests of public policy to encourage efficiency in government, the elimination of waste in government agencies and the proper use of taxpayer funds, make this review compelling.

POINT I

WHETHER THE LOWER COURTS, IN PUBLIC EMPLOYEE DISCHARGE CASES, MUST EXAMINE WHETHER OR NOT THE GOVERNMENT USED THE LEAST RESTRICTIVE MEANS TO ACHIEVE ITS LEGITIMATE GOAL, OR, HAS THIS COURT, IN ELROD V. BURNS, 427 U.S. 347 (1976) AND BRANTI V. FINKEL 445 U.S. 507 (1980), FORECLOSED THIS EXAMINATION AND STRUCK AN AUTOMATIC STANDARD OF REVIEW.

Elrod v. Burns, supra and Branti v. Finkel, supra are the two cases decided by ths court which address the question of political affiliation in the discharge of public employees. In Elrod, this court upheld the Seventh Circuit's finding that the dismissal of the employees was based solely on political factors. All of the employees dismissed were of a different political association than the defendant, and all of the employees hired were of the same political association as the defendant. In order for the employees to retain

their positions, defendant required that the employees have an endorsement from his political association. The employees were low-level, non-policymaking employees, and none of their replacements were better qualified. The only prerequisite for the job was a political endorsement from the in party.

In Branti, the defendants dismissed all employees of the opposing political association and replaced these employees with those of his political association. The replaced employees were selected by Branti's political associates.

The United States Supreme Court in Elrod v. Burns, supra, recognized that subordination of some First Amendment activity, such as limited appointed personnel dismissals, are

permissable to safeguard the partisan goals of the incumbent administration, the integrity of the electoral process and to insure a healthy democratic system. Id. at 365-370.

Similarly, the United States Supreme Court in Branti v. Finkel, supra, recognized the compelling state interest when First Amendment violations are alleged:

> If an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.

445 U.S. at 517

Thus this Court did not reject an examination of the state's interest in either Elrod or Branti. Rather, the Court

in Elrod and Branti, based on the facts found that the governmental end was not efficient and effective government as alleged but instead was political loyalty. This Court held that in cases where political loyalty is sought the proper examination is whether the position itself requires political affiliation to carry out the duties effectively. Elrod v. Burns, supra at 367; Branti v. Finkel, supra at 518. Because there was a wholesale dismissal of the employees in Elrod and Branti. This criteria was not met, and this court concluded that their discharge was based solely on political affiliation.

Similarly, the court below should not reject an examination of the state's interest in the case at bar. The Pickering compelling state interest

analysis is necessary in the present case where the discharge of the employees was not solely because of political affiliation. See Barnes at 506. Rather, Petitioner Bosley ran on a campaign platform to bring an efficient and effective administration to the troubled clerk's office. The fact that Petitioner Bosley discharged, by using the least restrictive means, only four employees out of two hundred and twenty and replaced the discharged employees with "better qualified" employees with superior credentials, makes the examination of the state's interest equally compelling in the present case.

The conclusion reached by the courts below in this case, are the same as those reached in Elrod and Branti although the facts differ substantially from Elrod and

Branti and warrant a different outcome.

As noted by dissenting Judge Bright:

> .... Unlike Elrod, this is not a case where the discharging official cannot be said to have had no concern for "efficiency and effective government" when he made the discharges. To the contrary, the need for more efficient management of the clerk's office provided the central theme of defendant Bosley's election campaign.
>
> . . . Again unlike Elrod, this is not a case where a mass party-based discharge, followed by reinstatement of all but those who failed to change party affiliation or obtain party sponsorship, undermines any possible argument that administrative efficiency justified the discharges. Clerk Bosley, unlike Sheriff Elrod, replaced only a very few key supervisory employees, retaining in office all the other employees, including those who had openly opposed his election. Moreover, there is no dispute that Bosley's appointees had superior credentials in public administration to the Roddy appointees they replaced. Finally, unlike Elrod, this is not a case where the discharged officials clearly occupied "non-policy making,

non-confidential" positions. See Elrod, supra, 427 U.S. at 375, 96 S.Ct. at 2690 (Stewart, J. concurring in the judgment), Branti supra 445 U.S. at 517, 100 S.Ct. at 1294.

The distinctions between this case and Branti are equally important. The plaintiff, officials in this case held high-level, supervisory positions with a large ministerial agency. Their duties naturally included both advising the clerk of court on the administration of the office and carrying out of his policy directive. In Branti, by contrast, the duties and responsibilities of the assistant attorneys ran primarily to their individual numbers of subordinate employees or advising the public defender on office policy o r administration. The need for a close relationship of confidence and trust between the clerk of court and his principal deputies in this case, and the lack of such a need between the public defender and the assistant defenders in Branti, seem to be clear and compelling. (Emphasis added)

745 F.2d at 510.

The courts below failed to

comprehend and apply the analysis of this Court in Elrod and Branti. In Elrod, this court examined the legitimate state interest in efficient and effective government to determine if the least restrictive means was employed. Elrod, supra at 559. Because this Court found in Elrod and Branti that the allegation of efficient and effective government was merely a pretext for political loyalty, and that the least restrictive means was not employed was, the court found that the discharge was solely for political reasons.

In Branti the Court addressed political loyalty and concluded that in come cases political affiliation may be necessary and thus, can be a legitimate government interest where "party affiliation is an appropriate requirement

for the effective performance of the public office involved." Id at 518.

The Eighth Circuit below, concluded that this Court in Elrod:

> . . . struck the balance between the government's interest in efficient management and the public employee's interest in free political association. The Court held that political affiliation is always protected unless the employee occupies a position that requires a political viewpoint which is in harmony with the viewpoint of her or her supervisor.

745 F.2d at 507.

This interpretation of Elrod precludes any examination of the legitimate state interest in an efficient and effective administration, the basis for Petitioner Bosley's election least restrictive means employed by Petitioner Bosley. Bosley was not attempting to

assure loyalty of his subordinates. If this were the case, over ninety percent of the office would have been discharged, since that percentage supported his opponent.

The execution of this campaign promise required that Petitioner Bosley terminate some of the employees in order to bring in employees that had the credentials necessary to improve operations in the clerk's office. Other courts have affirmed this legitimate governmental interest in efficiency. See, Loughney v. Hickey, 635 F.2d 1063, 1068 (3rd Cir 1980), and Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir 1980). In Landry v. Farmer, the Court stated:

> . . . (Political considerations are) secondary to the sincere appraisal and reasoned conclusion of the Secretary that the changes that were made as part of the reorganization

> of her office were necessary. This Court finds . . . (that these changes serve) the laudable aim to improve the efficiency of the Office of the Secretary of State and not be fettered by the routine and practices of a predecessor who was voted out of office.

564 F.Supp.. at 606.

The Eighth Circuit's interpretation of Branti now forecloses any newly elected official from improving the efficiency of the office by hiring people with superior credentials. This has a devastating affect upon the public's ability to voice its concern about a poorly run office through the electoral process, and the important public policy to eliminate waste in government. In essence, the Eighth Circuit in the present case has intervened and tied the hands of all public officials disallowing any improvement by replacing inefficient

employees with those that are better qualified. This is a standard not applied in private industry, where the best qualified individual is employed. Will this court allow the Eighth Circuit to encourage the running of a public office with less qualified people in an inefficient manner? Should the President of the United States be unable to improve the efficiency of government by hiring better qualified individuals without a showing that the discharged employee's position requires party affiliation? Failure to correct this problem in this area of the law results in this Court's endorsement of the use of the First Amendment as an instrument that ruptures the basic fabric of a political democracy of effective self-government. See Loughney v. Hickey, supra at 1070.

POINT II

WHETHER A PUBLIC EMPLOYEE, WHO HAS ALLEGED THAT HIS DISCHARGE WAS BECAUSE OF POLITICAL AFFILIATION, MUST ESTABLISH THAT HIS POLITICAL AFFILIATION WAS THE "SOLE MOTIVATING FACTOR" OR SIMPLY A "SUBSTANTIAL MOTIVATING FACTOR" IN THE REASON FOR HIS DISCHARGE.

The decisions of this court in Elrod and Branti were reached where the sole basis for the discharge of the employees was political affiliation. Uncertainty remains, however, over whether, in rendering these decisions, this Court addressed the burden of proof question requiring that the plaintiff either show that the protected conduct was the "sole motivating factor", or that it was merely one of many factors as required by the Mount Healthy standard.

Confusion exists among and within

the circuits as to what standard must be applied, whether it is the "sole motivating factor" or "substantial motivating factor" test, as well as what criteria and/or factors must be considered in order to reach a finding of "sole motivating factor".

The Seventh Circuit, the same circuit that produced Elrod (and whose decision this court affirmed), in Wren v. Jones, supra, a case factually similar to the case at bar, found that the appropriate standard to apply was the Mount Healthy standard or the Pickering examination. Wren, supra at 1283, 1284. The court reviewed Elrod and Branti and concluded that they were limited in their application to wholesale patronage dismissal cases where employees were "discharged solely on the basis of their

political beliefs." Id at 1283 and no other reasons existed for the terminations.

The Fifth Circuit of Appeals, in McBee v. Jim Hogg County Texas, 730 F.2d 1009 (1984) (en banc) attempted to define "sole motivating factor" and to distinguish the use of Elrod-Branti:

> Elrod and Branti, we think, lie at the extreme of the employee's side, where little, if any, weighing is called for. There employees who were ... both loyal and effective were discharged on the sole ground of their private and ... all but abstract political views. They did not campaign, they did not even speak. They merely thought. No countervailing considerations appear; they suffered discharge for pure political beliefs a circumstance that explains the comparative absence of "weighing" terminology in these opinions. (emphasis added).

730 F.2d at 1014.

The need for clarification of "sole motivating factor" criteria is further evident by reviewing the decision of the Fourth Circuit in Bever v. Gilbertson, supra, which directed the District Court to apply Elrod - Branti where party affiliation was merely alleged to be the sole criterior for discharge. The Court summarily rejected defendant's defenses establishing countervailing factors, Bever, supra at 1089.

Recently, some circuits have rejected the "sole motivating factor" test. The Seventh Circuit in Nekolny v. Painter, supra at 1168 refused to apply the "sole motive" test where employees were discharged "after a change of administration following an election." Instead the Court chose to apply the Mount Healthy test because:

> ... (it) allows a defendant to terminate an employee for any legitimate reason, even where ... a reason violative of the First Amendment was also a substantial or motivating factor in the decision.

F.2d 598 at 1168.

A case in the First Circuit, Landry v. Farmer, 564 F.Supp. 598 (D.C. R.I. 1983) a District Court concluded that Elrod - Branti did not address the burden of proof problem and thus applied Mount Healthy.

The Eighth Circuit below rejected the "sole motive" stricter scrutiny test adopted by the District Court and instead applied the Mount Healthy "mixed motive" standard. The reasons for rejecting the "sole motive test" are unclear. Basically, the court is stating that if a political reason is one of many reasons, the discharge is improper. Further, in

this present case unlike Elrod and Branti, petitioners and respondents were of the same political party. Therefore, party affiliation being the same, does not bring this case within the folds of Elrod or Branti.

These differing interpretations of Elrod - Branti and the "sole motivating factor" test indicates the conflict, vagueness and confusion prevalent among the circuits on this and other criteria that my be applied in First Amendment political affiliation cases.

This Court should clarify the problem in this area of the law by reaffirming the "sole motive" test, and set forth the appropriate factors a court must consider to reach a finding of "sole motive", see McBee v. Jim Hogg County,

supra, or, in the alternative distinguish clearly the applications of these two tests.

POINT III

WHETHER THE LOWER COURT MUST MAKE A CASE-BY-CASE EXAMINATION UNDER PICKERING V. BOARD OF EDUCATION, 391 U.S. 563 (1968) OF THE GOVERNMENT'S INTEREST IN FIRST AMENDMENT CASES.

In First Amendment cases, the reach of Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980) has been misunderstood and extended to apply in cases factually dissimilar to Elrod or Branti. The court below rejected the examination of state interest required in First Amendment cases; stating that this court struck an automatic balance between the government's interest in efficient management and the public employee's interest in free political association in

Elrod, Barnes v. Bosley supra at 506, thereby eliminating the need to apply the Pickering examination as set forth in Pickering v. Board of Education, supra, applied by this court in Elrod, Branti and reaffirmed in Connick v. Myers, 461 U.S. 138 (1983). Other circuits continue to examine the state's interest in cases where there has been no wholesale dismissal and evidence shows that the government attempted to improve its efficiency and effectiveness through the least restrictive means. See Tanner v. McCall, supra, McBee v. Jim Hogg County Tex., supra and Wren v. Jones, supra. The dissent in the Fourth Circuit opinion raised, in Bever v. Gilbertson, supra the issue of vagueness and uncertainty of the law in patronage cases and the Third Circuit in Loughney v. Hickey, supra noted problems of interpreting the

Elrod-Branti cases.

Conflict and uncertainty herald the circuit's application of Pickering. This conflict exists not only among the circuits, but within the Eighth Circuit itself, where it has applied Pickering in many cases: Atcherson v. Siebenmann, 605 F.2d 1058, 1063 (8th Cir. 1979), Brockwell v. Norton, 668 F.2d 588, 592 (8th Cir. 1982), Reel v. Arkansas Dept. of Corrections, 672 F.2d 693, 696 (8th Cir. 1982), Otten v. Schicker, 665 F.2d 142, 143 (8th Cir. 1981), Derrickson v. Board of Education of City of St. Louis, 703 F.2d 309, 316 (8th Cir. 1983), and Nathanson v. United States, 702 F.2d 162, 165, (8th Cir. 1983). The Eighth Circuit now states, however, that this test is no longer applicable in First Amendment public employee discharge cases; and thus

refused to apply the Pickering analysis in this case below.

When presented with facts similar to those in Tanner, supra and McBee, supra, where there was no wholesale dismissal of employees and where evidence established that the least restrictive means were used to improve the efficiency of government, the Eighth Circuit failed to follow the Fifth Circuit's clarification of the state of the law in these cases. In its opinion in McBee, the Fifth Circuit, after reviewing Elrod, Branti and Connick stated:

> .... we conclude that the standard to be applied by us in resolving such public employee discharge or nonrenewal cases as this is the Pickering balance test. Each case must be considered on its particular facts, sifting through such factors and circumstances as the

> Connick Court authorized in order to strike the proper balance between the employee's speech and associational rights as a citizen and the state's right to loyal and efficient service.

730 F.2d at 1014.

This Court has similarly held that First Amendment rights may be required to yield to the "state's vital interest in maintaining governmental effectiveness and efficiency." Branti v. Finkel, supra at 517. The interest advanced must be paramount, one of vital importance, and the burden is on the government to not only show the existence of such an interest, but also demonstrate that: (1) the means chosen are rationally related to that end; (2) the means are least restrictive of freedom of belief and association in achieving that end; and

(3) the benefit gained outweighs the loss of constitutionally protected rights, Elrod v. Burns at 362-366. Thus, subordination of some First Amendment activity, such as limited appointed personnel dismissals, are permissible and particularly applicable to the case at bar. The Eighth Circuit, however, interprets Elrod-Branti as always protecting the First Amendment rights of the employee despite the least restrictive means used by government to achieve effective and efficient administration, a legitimate ends of government.

As such, the core interests of individual belief and association under the First Amendment which marks the conflict between the parties in the present case, requires that the court

engage in balancing the private interests of three employees, as citizens, in exercising their rights of political belief against those interests of the State, as employer, necessary to effectuate the legitimate ends of smooth administration of representative government through efficient public services it performs for the City of St. Louis, through the least restrictive means. Elrod v. Burns supra at 371, Pickering v. Board of Education, supra, at 568.

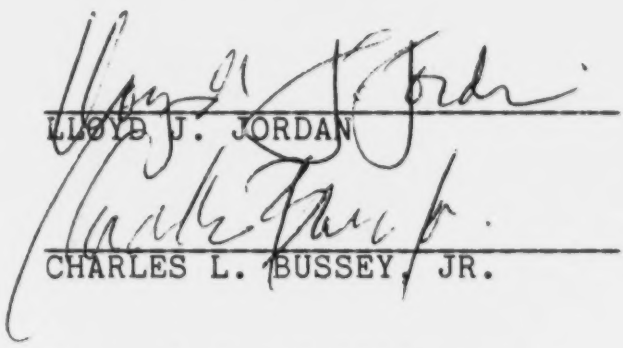
CONCLUSION

This court is requested to unify the varying applications of Elrod, Branti, Pickering and Mount Healthy; clarify the application of the different standards found in these cases; address the use of the least restrictive means to attain the legitimate ends of efficient and

effective government in First Amendment public employees discharge cases; and protect the sanctity of the electoral process.

Respectfully submitted,

BUSSEY AND JORDAN



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CERTIFICATE OF SERVICE

I, Lloyd J. Jordan, Counsel for Petitioners, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari were served upon Counsel for Respondents by depositing said copies in the United States mail with first-class postage prepaid on the 15th day of February, 1985, addressed as follows:

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LLOYD J. JORDAN

A/9b/1.10

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Appeals from the
United States District Court
for the Eastern District of Missouri

Nos. 83-2127/2178/2179-EM.

September Term,1984

Shirley Barnes, Frances J. McElroy and Murrell Thomas,
Appellees/Cross-Appellants,

vs.

Freeman (Teek) Bosley and Paula Carter,
Appellants/Cross-Appellees.

The order of this Court entered December 14, 1984 is hereby amended to reflect that Judges Bright, Ross, Fagg and Bowman would have granted the petition for rehearing en banc.

December 21, 1984

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Appeal and Cross-Appeal from
United States District Court
for the Eastern District of Missouri

No. 83-2127

Shirley Barnes, Frances J. McElroy and Murrell Thomas,

Appellees,

v.

Freeman (Teek) Bosley and Paula Carter,

Appellants.

No. 83-2178

Shirley Barnes, Frances J. McElroy

Appellants,

and Murrell Thomas,

v.

Freeman (Teek) Bosley and Paula Carter,

Appellees.

No. 83-2179

Shirley Barnes, Frances J. McElroy and Murrell Thomas,

Appellant,

v. *

Freeman (Teek) Bosley and Paula Carter, *

Appellees. *

Submitted: May 15, 1984

Filed: September 27, 1984

Before HEANEY, BRIGHT and JOHN R. GIBSON, Circuit Judges.

HEANEY, Circuit Judge.

This action arose out of the dismissals of Shirley Barnes, Frances J. McElroy and Murrell Thomas from their positions as employees in the Clerk's Office of the Circuit Court of the City of St. Louis. The plaintiffs, all political supporters of the previous Clerk of Court, were dismissed when the newly elected Clerk took office. They subsequently filed a complaint alleging violations of their first, fifth and

fourteenth amendment rights under 42 U.S.C. S 1983. They also alleged a conspiracy to violate their civil rights under 42 U.S.C. SS 1985 and 1986.

The district court found all plaintiffs were fired because of their political affiliations, but that only McElroy and Barnes were protected by the first amendment because they were dismissed from jobs in which political affilitation was not an appropriate requirement. The court found that Thomas had no first amendment protection because he was transferred into a ministerial position just before the new clerk took office to avoid dismissal. The court also found against the plaintiffs on their other claims. The defendants appeal the judgment in favor of Barnes and McElroy; the plaintiffs cross-appeal the judgment against Thomas and their other claims, and the award of

attorney's fees.

Because we find the district court used the proper legal standard and its findings were not clearly erroneous, we affirm the judgment as to McElroy and Barnes. We view Thomas's transfer from an unprotected position to a protected position as irrelevant to the first amendment analysis and reverse the judgment against him. We increase the award of attorney's fees to take into account the success of Thomas's claim.

BACKGROUND.

Barnes, McElroy and Thomas were employed as Deputy Circuit Clerks for the St. Louis Circuit Court prior to January 3, 1983. All three were long-term employees who had been hired under the patronage system at low level jobs and had worked their way up into

management positions. At the time of Barnes' dismissal, she was a Unit Manager I in charge of ten departments. McElroy started out as a janitor-messenger in 1963. He was promoted five times and was a Unit Manager II at the time of his dismissal. Thomas also began as a janitor-messenger and had worked for the Clerk's Office for over nineteen years. He had been promoted to Administrative Assistant I. Two weeks prior to the changeover in circuit court clerks, he was transferred from Administrative Assistant I to Courtroom Clerk III, a demotion in responsibility but with no change in salary.

Joseph P. Roddy was the Circuit Court Clerk, an elected position, from 1968 to 1983. All three plaintiffs were members of the "Roddy faction" within

the Democratic Party in the City of St. Louis: the defendants stipulated that McElroy was politically affilitated with Roddy; Thomas had been active in Roddy's Seventeenth Ward organization since 1972; Barnes had been Roddy's campaign treasurer from 1973 through December, 1982. In August of 1982, Freeman Bosley, Jr., defeated Roddy in the Democratic primary. Bosley subsequently won the general election and was sworn into office on January 1, 1983.

During the time between the general election in November of 1982 and January 1, 1983, Bosley appointed a transition team to review the operations of the Clerk's Office. The team members were Frank McGhee, who had worked in Bosley's phone bank during the campaign; Paula Carter, office manager for Bosley's

campaign headquarters; Jimmy Edwards, Bosley's legal advisor during the campaign; and Charles Hoehn, campaign manager for a third candidate during the primary who later advised Bosley in his campaign. After interviewing over forty employees in the office, the transition team recommended firing the three plaintiffs and Roddy's legal adviser, Thomas Bauer. Bosley fired all of these people three days after taking office. Almost immediately, he appointed Hoehn to McElroy's position, Carter to Thomas's position, and McGhee to Barnes' position. The plaintiffs then instituted this action.

The district court held that the plaintiffs had succeeded in proving that their political affiliation with Roddy was the sole reason they were dismissed. Although the defendants had

contended the plaintiffs were incompetent and their replacements were better qualified, the distarict court specifically found that Bosley would not have fired the plaintiffs if they had not supported the Roddy faction. The court acknowledged that the plaintiffs had held management supervisory positions, but held that political affiliation was irrelevant in excercising the circumscribed discretion attendant to those positions. McElroy and Barnes thus succeeded in their first amendment claim. As to Thomas, however, the court held his transfer should be disregarded because it was made to avoid possible dismissal. The court deemed the Administrative I position held by Thomas before the transfer as one in which political affiliation was an appropriate requirement. The court also entered

judgment in favor of the defendants on the plaintiff's due process and sections 1985 and 1986 claims. McElroy and Barnes were ordered reinstated with back pay and the court subsequently awarded attorneys' fees in the amount of $12,700.

II. DISCUSSION.

The defendants claim: (1) that the district court erred in failing to balance the plaintiffs' first amendment rights against the government's interest in efficient management; (2) that the district court's finding that the plaintiffs were terminated for political reasons is clearly erroneous; and (3) that even if the plaintiffs were terminated for political reasons, the district court clearly erred in finding that political affiliation was not an

appropriate requirement for their positions. In his cross-appeal, Thomas contends the district court should not have disregarded his transfer in determining whether he too occupied a protected position at the time he was dismissed. We disagree with the defendant's assertions, but agree with Thomas.

A. Legal Precedents.

The seminal Supreme Court cases dealing with public employee terminations based on political affiliations are Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkle, 445 U.S. 507 (1980). In Elrod, a plurality of the Court held that the newly elected Sheriff of Cook County, Illinois, could not terminate employees merely because they were not members of the Democratic Party and failed to

obtain the sponsorship of one of its leaders. Elrod v. Burns, supra, 427 U.S. at 351. Writing for the plurality, Justice Brennan reasoned that because the sheriff's employees had to join and work for the Democratic Party in order to retain their jobs, the system necessarily coerced employees into compromising their true beliefs. In his view, this use of governmental power to prescribe political beliefs struck at the heart of the first amendment and thus the patronage system in its blanket application to all employees at all levels of government work was unconstitutional. Id. at 356-357.

Justice Brennan further reasoned that an unconstitutional condition may not be placed on the receipt of a public benefit. See Perry v. Sindermann, 408 U.S. 593, 597 (1972); Keyishian v. Board

of Regents, 385 U.S. 589, 642 (1967).

In Perry, the Court stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the goverment to "produce a result which [it] could not command directly." * * * Such interference with constitutional rights is impermissible.

Perry v. Sindermann, supra, 408 at 597 (citation omitted").

Justice Brennan concluded that a person's political beliefs could not be the sole basis for depriving him or her of continued public employment unless the government could demonstrate an overriding interest. Elrod v. Burns,

supra, 427 U.S. at 368. Justice Stewart's concurring; opinion accepted this latter ground for invalidating dismissals based on political affiliation.

As both opinions in Elrod recognized, party affiliation may sometimes be an acceptable requirement for some types of government employment. Public employees' first amendment rights may have to yield to the government's vital interest in maintaining governmental effectiveness and efficiency if their private political beliefs would interfere with their public duties. Id. at 366. The plurality concluded, however, that the governmental interest in effectiveness and efficiency is only seriously threatened when an employee with an opposition party viewpoint is in a

policymaking and confidential position. Employees in those positions are thus vulnerable to dismissal for their political affiliation. Id. at 372-375.

In Branti v. Finkel, supra, 445 U.S. at 518-519, the Supreme Court clarified the criteria to be used in determining which employee positions are not protected under Elrod. In Branti, two Republican assistant public defenders were fired from their jobs when a Democrat was appointed as their supervisor. The supervisor contended on appeal that assistant public defenders hold policymaking and confidential positions and should be subject to firing when a new party takes power.[1] The Court disagreed, holding that the inquiry is whether political affiliation is an appropriate requirement for a position, not whether it is confidential

or policymaking in nature. The court recognized that some employees make policy and receive confidences about matters wholly unrelated to their political viewpoint. The court compared a football coach to a governor's aide. Both make policy, but only the latter's political affiliation is relevant to those policies. The Court concluded that allegiance to a political party is not an appropriate condition of employment for a public defender whose

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[1] The other contention on appeal was the Elrod was limited to situations in which government employees are coerced into pledging allegiance to a politcal party they would not voluntarily support and does not apply to the simple requirement that an employee be sponsored by the party in power. The Court found this interpretation would repudiate the conclusion in Elrod that the first amendment prohibits the dismissal of an employee solely because of his political beliefs. Branti v. Finkel, 445 U.S. 507, 516-517 (1980).

primary responsibility is to represent citizens in controversy with the state.

B. The Instant Case.

Initially, we address the defendant's contention that the district court should have used the balancing test set out in Pickering v. Board of Education, 391 U.S. 563 (1968), in determining whether the plaintiffs' first amendment rights were violated. The Pickering balancing test is usually the first level of analysis in first amendment cases. Bowman v. Pulaski County Special School District, 723 F.2d 640, 643 (8th Cir. 1983). By balancing the interest of the public employee, as a citizen, in commenting upon matters of public concern against the state employer's interest in promoting the efficiency of the public services it performs, the court determines whether the employee's conduct is protected by

the first amendment. Id. at 568. If the balance favors the employee, he or she must still prove the protected conduct motivated the dismissal, and the employer may defend by proving independent reasons for any adverse disciplinary action. Givhan v. Western Lines Consolidated School District, 439 U.S. 410, 416-417 (1979); Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

The Pickering balancing test need not be used in determining whether the first amendment protects political affiliation. In Elrod, the Supreme Court struck the balance between the government's interest in efficient managment and the public employee's interest in free political association. The Court held that political affiliation is always protected unless the

employee occupies a position that requires a political viewpoint which is in harmony with the viewpoint of his or her supervisor.

Upon reviewing the evidence introduced at trial, we are convinced the trial court did not clearly err in its findings that political motives prompted the plaintiffs' dismissals.[2] The court cited the following factors to support its finding: (1) the plaintiffs were discharged three days after Bosley was sworn in; (2) Bosley wrote to a judge on the circuit court regarding the

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[2] The defendants do not contend on appeal as they did below that Branti and Elrod are inapplicable here because Roddy and Bosley were both Democrats. The district court labeled this contention as "specious", taking judicial notice of the fact that the only real political contests in the City of St. Louis occur at the primary level. Barnes v. Bosley, 568 F. Supp. 1406, 1412

discharge of the plaintiffs (although they were unnamed in the letter) before they were interviewed by the transition team; (3) the transition team interviews with Barnes and McElroy did not touch to any significant extent upon the plaintiffs' qualifications or job history; (4) the plaintiffs were close political affilitates of Roddy; (5) the termination letter stated the plaintiffs were being terminated from "policymaking and/or nonconfidential position [s]; " and " (6) Bosley made public statements to the effect that he had the desire and right to bring his own team into the clerk's office. Barnes v. Bosley, 568 F. Supp. 1406, 1410 (E.D. Mo. 1983)

The defendants dispute the significance of these factors, maintaining that Bosley fired the plaintiffs because he thought his own

management team was better qualified and could do a better job. They point out that the transition team interviewed over forty employees in the Clerk's Office including Barnes and McElroy and studied the operations of the office. In addition, several former Roddy supporters still hold jobs in the Clerk's Office and have not been pressured to change their party allegiances.[3]

We nonetheless believe that the evidence is sufficient to uphold the

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n.7 (E.E. Mo. 1983).

[3] According to the defendants, these witnesses also testified that Barnes and McElroy were not active in the Roddy faction. An examination of their testimony reveals, however, that they said they did not see Barnes and McElroy at the Seventeenth Ward meetings, but that both were known to be active Roddy supporters.

district court's finding. It is evident from the record that Bosley and his transition team gave the plaintiffs' qualifications cursory treatment. The transition team questionnaires for Barnes and McElroy show only a few questions were asked. The team did not interview Thomas at all. Bosley talked to the plaintiffs on January 3 and asked them to submit resumes, but fired them on January 4 before they could submit them. Futhermore, the district court found the plaintiffs were competent in their positions, citing their many years of satisfactory service accompanied by a substantial number of promotions. The court also found the plaintiffs had sufficient education to perform the duties of their respective positions.

Moreover, even if the defendants are correct in asserting that political

affiliation was not the sole motivating factor behind the plaintiffs' dismissals, the plaintiffs have still carried their burden of proof because, as the district court found, the defendants failed to show that nonpolitical reasons would have prompted the dismissals in any event. In "mixed motive" cases, where the evidence demonstrates that both legitimate and illegitimate motives may have prompted action against a public employee who engaged in protected conduct, the allocation of the burden of proof is dictated by Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1974). Initially, the burden is on the plaintiff to show that his or her conduct is constitutionally protected and that this conduct was a substantial or motivating factor in the

action taken against him or her. The defendant may then defeat that plaintiff's claim by demonstrating that the same action would have been taken in the absence of the protected conduct. Id. at 287.

The Mount Healthy standard is appropriate in cases where the protected conduct is party affiliation and mixed motives are alleged. Nekolney v. Painter, 653 F. 2d 1164, 1167-1168 (7th Cir. 1980), cert. denied, 454 U.S. 832 (1981); Tanner v. McCall, 625 F.2d 1183, 193 (5th Cir. 1980), cert. denied, 451 U.S. 907 (1981). Although Elrod and Branti were cases in which the Supreme Court accepted the factual finding below that political affiliation was the sole motive for firing the plaintiffs, we see no reason to apply a stricter standard for political affiliation cases than is

applied in other first amendment cases.[4] In the instant case, therefore, once the plaintiffs established that their political affiliation was a motivating factor in their dismissals, the burden shifted to the defendants to show by a preponderance of the evidence that the plaintiffs would have been discharged in any event.

The district court found, and we agree, that the defendants failed to carry this burden. The two main themes in the defendants' evidence were that

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[4] The district court opted not to apply the Mount Healthy analysis because it found the plaintiffs had met the more difficult burden of proving that political affiliation was the sole motivation behind their discharge. It nevertheless made the appropriate findings for a Mount Healthy analysis. Barnes v. Bosley, supra, 568 F. Supp. at 1410-1411.

Bosley wanted a new management team and the replacements were better qualified and more competent that the plaintiffs' long years of satisfactory service and the type of skill required by their jobs. The court concluded that the plaintiffs were in fact experienced and competent employees and that they would not have been discharged if they had not been longtime political supporters of the previous clerk. In our view, this finding is not clearly erroneous.

Once it is established that political affiliation motivated the plaintiffs' discharge, the question still remains whether Bosley needed his own political supporters in those positions to insure the smooth functioning of the Clerk's Office. The defendants argue the district court erred in finding political affiliation

was not an appropriate requirement for these positions. We disagree.

All of the plaintiffs occupied management positions in the Clerk's Office. The district court found, however, that their duties were, for the most part, ministerial. The Missouri Supreme Court had promulgated rules and regulations for the administration of the state court system. As department supervisors, the plaintiffs' main functions were to insure that their departments ran according to the rules. Discretionary decisions were, for the most part, referred to the circuit clerk. The defendants introduced memoranda from McElroy and Barnes in an attempt to prove they held policymaking positions. These memoranda concerned mailing procedures, dress code, and the ordering of office supplies--hardly

areas where political affiliation would influence policy. Other employees testified for the defendants that the plaintiffs wielded a lot of influence when Roddy was clerk. We agree with the district court, however, that this influence was because of their political ties to him, rather than inherent in the positions they held.

After carefully reviewing the record, we believe the district court did not err in finding the plaintiffs' political affiliation was not important to the posiitons they held. Like the public defenders in Branti and the football coach in the Court's example in that case, these plaintiffs' political viewpoints would not influence policy-making in the areas within their discretion. Because the plaintiffs proved the two elements essential to

their cases, we affirm the district court's judgment in favor of Barnes and McElroy.

For the same reason, we reverse the disrict court's judgment against Thomas. The only factor distinguishing Thomas's case from the cases of the other two plaintiffs is that he was transferred to a predominantly ministerial position from his position as second in command to the clerk just before Bosley took office. The district court disregarded the transfer because it was done to avoid possible dismissal, and it put the person who was transferred into Thomas's old job in jeopardy of dismissal for political affiliation. Neither of these reasons persuade us that Branti and Elrod analyses should not be applied to Thomas's case. Thomas was dismissed

because of his political affiliation, even though political affiliation had no relevance to the ministerial position he held at the time Bosley took office. How Thomas got that position is irrelevant. Bosley could have dismissed him as incompetent, or lowered his salary if he thought it was too high for the position Thomas held. Bosley could not, however, dismiss Thomas for political reasons. Since that is what the district court found was done, Thomas must succeed in his action.

Because we hold the plaintiffs succeeded on their first amendment claim, we need not address their due process claim and the conspiracy claim brought under 42 U.S.C. SS 1985 and 1986. We agree with the district court that the evidence in this case does not justify damages for emotional distress.

See Nekolny v. Painter, supra, 653 F.2d at 1172. We also affirm the district court's award of attorneys' fees, except we increase the award to reflect Thomas's success on appeal. The district court reduced each counsel's billed court time by twenty-five percent to take into account the disposition of Thomas's claims below. We therefore increase the award by that amount for a total award of $13,900.[5] In all other respects, we agree with the district court's determination as to attorneys' fees.

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[5] Each counsel billed twenty-four hours for court time. The court reduced this figure to eighteen hours and awarded Mr. Oldham $125 per hour for court time and Mr. Bauer $75 per hour for court time. We add back in the six hours at the court's established rates.

III. CONCLUSION.

The district court did not err in the bulk of its legal analysis or factual findings in this case. It found that the plaintiffs proved their political affiliation was the motivating factor in their dismissals and that the defendants would not have fired the plaintiffs if they had not been members of the Roddy faction. The court also found political affiliation was not an appropriate requirement for the positions the plaintiffs held at the time of their dismissals. These findings are not clearly erroneous and the judgment in favor of McElroy and Barnes is affirmed. We reverse the judgment against Thomas because we find his transfer irrelevant for purposes of first amendment analysis, and modify the attorneys' fee award accordingly. In

all other respects, the district court's judgment is affirmed.

BRIGHT, Circuit Judge, dissenting.

In my view, the result the majority reaches in this case is neither sound as a matter of policy, nor compelled, as a matter of law, by relevant precedent. Specifically, I believe this case to be distinguishable on its facts from the two leading Supreme Court decisions on patronage firing, Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), the principal authority on which the majority relies. Therefore I dissent.

This case does not require us to consider the constitutionality of a wholesale purge for political reasons of large numbers of public employees. Here a public official, elected on a promise

to improve the managment of a 220-member ministerial agency, upon taking office simply replaced four top-level supervisory personnel in the agency with persons of his own choosing. Significantly, he retained all the lower-level employees, including many who were open supporters of the incumbent clerk whom he defeated in the primary.

It seems to me that anyone responsible for the operation of an agency with hundreds of employees and a budget of millions of dollars would want, and should be entitled, to appoint his own principal subordinates. Indeed, efficient, effective administration would seem to depend upon the relationship of trust and confidence between the principal officer and his closest aides, whether that officer is appointed or elected, and whether the agency is public or private. Therefore,

in the absence of precedent compelling a contrary result, I would uphold the right of a top official to choose his own close aides.

The leading cases do not compel a contrary result here. In Elrod v. Burns, supra, the newly elected Democratic sheriff of Cook County, Illinois, discharged a large number of patronage employees who had been appointed by his Republican predecessor. The reason given for the discharges was simply that jobs were needed as patronage for Democratic loyalists. 427 U.S. at 364 n.18. Many of those discharged were reinstated after they changed their party affiliation from Republican to Democrat or obtained sponsorship letters from Democratic leaders. Four employees who were not reinstated brought suit, and the Supreme Court held that their

discharge, solely because they refused to affiliate with the Democratic Party and failed to obtain the sponsorship of a party leader, violated their rights of free belief and association under the first and fourteenth amendments

Justice Brennan, in the plurality opinion,[1] specifically observed that "efficiency and effective government" were not concerns of the sheriff who perpetrated the partisan purge in Elrod, 427 U.S. at 364 n.18, nor, the plurality commented, could it plausibly be urged that efficient administration would be

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[1] The plurality consisted of three justices. Two others, who declined to join in the sweeping language of the plurality opinion, concurred in the judgment, solely because the plaintiff employees clearly held "nonpolicymaking, nonconfidential" positions. 427 U.S. at 375 (Stewart, J., concurring in the judgment).

advanced by the "wholesale replacement of large numbers of public employees every time political office changes hands." 427 U.S. at 364.

Likewise, in Branti v. Finkel, supra, the Court held unconstitutional the discharge of two assistant public defenders by the newly appointed Democratic public defender of Rockland County, New York. The assistant defenders were discharged solely because they were Republicans and did not have Democratic sponsors. The Court emphasized that the discharged employees' duties extended only to representing the clients assigned to them; they had no supervisory responsiblity over other employees and no advisory role to play in the defender's administration of the office:

> Although * * * they had broad responsibilities with respect to particular cases that were assigned

> to them, * * * [they] had "very limited, if any, responsibility" with respect to the overall operation of the public defender's office. They did not "act as advisors or formulate plans for the implementation of the broad goals of the office" and, although they made decisions in the context of specific cases, "they do not make decisions about the orientation and operation of the office in which they work." * * * [T]hey did not occupy any confidential relationship to the policymaking process * * *.

445 U.S. at 507, quoting Finkel v. Branti, 457 F.Supp. 1284, 1291 (S.D.N.Y. 1978). Indeed, the Court went on to observe, "The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." 445 U.S. at 519.

To my mind, the case before us now differs in crucial respects from both Elrod and Branti. Unlike Elrod, this is not a case where the discharging

official cannot be said to have had no concern for "efficiency and effective government" when he made the discharges. To the contrary, the need for more efficient management of the clerk's office provided the central theme of defendant Bosley's election campaign. Again unlike Elrod, this is not a case where a mass party-based discharge, followed by reinstatement of all but those who failed to change party affiliation or obtain party sponsorship, undermines any possible argument that administrative efficiency justified the discharges. Clerk Bosley, unlike Sheriff Elrod, replaced only a very few key supervisory employees, retaining in office all the other employees, including those who had openly opposed his election. Moreover, there is no dispute that Bosley's appointees had

superior credentials in public administration to the Roddy appointees they replaced. Finally, unlike Elrod, this is not a case where the discharged officials clearly occupied "nonpolicy-making, nonconfidential" positions. See Elrod, supra, 445 U.S. at 375 (Stewart, J., concurring in the judgment); Branti, supra, 445 U.S. at 517.

The distinctions between this case and Branti are equally important. The plaintiff officials in this case held high-level, supervisory positions within a large ministerial agency. Their duties naturally included both advising the clerk of court on the administration of the office and carrying out his

policy directives.

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[2] That the published job descriptions for the positions held by plaintiff-appellants Barnes and McElroy did not specify that they advise the clerk on office administration does not negate either (1) the fact, found by the district court, that they performed advisory and confidential duties for former clerk Roddy or (2) the inescapable likelihood that, in administering a 220-person agency, incoming clerk Bosley would have to rely on the heads of the several subdivisions of the agency both for advice as to how administration could be improved and for cooperation and assistance in carrying out managerial policy within the office.

In Branti, by contrast, the duties and responsibilities of the assistant attorneys ran primarily to their individual clients, and did not include supervising large numbers of subordinate employees or advising the public defender on office policy or administration. The need for a close relationship of confidence and trust between the clerk of court and his principal deputies in this case, and the lack of such a need between the public defender and the assistant defenders in Branti, seem to me clear and compelling.

Accordingly, I disagree with the majority that Elrod and Branti must control the result here. Nor do I beleive that the result the majority reaches will advance the important interests of efficient public administration at stake in this case. Therfore I would reverse the decision of the district court respecting plaintiff-appellants Barnes and McElroy.

I concur in the court's disposition of the claims of plaintiff-appellant Thomas, who was dismissed not from a high-level managerial position but from a position that carried no supervisory or managerial responsibilities.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHIRLEY BARNES, FRANCES J. McELROY AND MURRELL THOMAS,	)	
Plaintiffs,	)	
v.	)	No. 83-53 C (2)
FREEMAN (TEEK) BOSLEY, JR., Clerk, Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis,	)	
Defendants.	)	

MEMORANDUM

This matter is before the Court for a decision on the merits of plaintiffs' complaint following a trial before the court. By agreement of the parties, the hearing on plaintiffs' request for a preliminary injunction was consolidated with the trial on the merits of plaintiffs' complaint. Fed.R.Civ.P. 65 (a) (2). After consideration of the

the testimony and exhibits introduced at trial, the parties' briefs, and the applicable law, the Court enters the following memorandum opinion which it adopts as its findings of fact and conclusion of law, pursuant to Fed.R.Civ.P. 52 (a).

This action arises out of the dismissals of plaintiffs as employees in the Clerk's Office of the Circuit Court of the City St. Louis (Clerk's Office). Their termination followed a change in the administration of the Clerk's Office after Freeman Bosley, Jr., had defeated incumbent Joseph P. Roddy in the Democratic primary for the office of Circuit Court Clerk. Plaintiffs, all of whom had supported Mr. Roddy in the Democratic primary, brought this action after they had been terminated by Mr. Bosley, alleging that the dismissals

violated plaintiffs' First, Fifth, and Fourteenth Amendment rights;[1] plaintiffs'also alleged a conspiracy on the part of defendants to violate plaintiffs' civil rights in violation of 42 U.S.C. SS1985, 1986. Plaintiffs seek declaratory and injunctive relief, compensatory and punitive damages, and attorneys' fees.

I. First Amendment

Plaintiffs' claims under the First Amendment, as applied to the states under the Fourteenth Amendment, Gitlow v. New York, 268 U.S. 652 (1925), are premised on the Supreme Court's

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[1] Plaintiffs are proceeding on their constitutional claims under 42 U.S.C. S1983. There is no question that defendants' actions were taken under color of state law and thus S1983 is an appropriate avenue by which plaintiffs may proceed in this action.

decisions in Elrod v. Burns, 427 U.S. 347 1976) and Branti v. Finkel, 445 U.S. 507 (1980) which prohibit a state actor from firing a public employee because of that employee's political beliefs. Plaintiffs allege that the newly elected Circuit Clerk, Freeman Bosley, Jr., terminated plaintiffs because they had been supporters of Bosley's primary opponent, Joseph Roddy. Defendants contend that the firings were not politically motivated and that even if the decisions to dismiss plaintiffs would be deemed political, plaintiffs cannot here prevail because they were all policymaking and/or confidential employees.

The Supreme Court in Elrod and

Branti established the doctrine that public employees cannot be fired on account of their political beliefs. Those decisions recognized the sanctity that the First Amendment's protections are accorded in our constitutional scheme. None can deny the importance in our democracy of the values and interests that the First Amendment seeks to protect. Not only does the Amendment protect citizens' freedom of belief and association, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), but also their freedom on nonassociation, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), and their right to know.

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2 "Established" is perhaps too strong a characterization of the Branti and Elrod opinions. Several decisions that protected the constitutional rights of public employees predate Branti and Elrod. See, e.g., Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) and Weiman v. Updegraff, 344 U.S. 183 (1952).

Stanley v. Georgia, 394 U.S. 557, 564 1969). As put most eloquently by Justice Brandeis in Whitney v. California, 274 U.S. 357, 375-76 (1926):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indespensable to the discovery and spread of political truth; that without free speech and assembly discussions would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage though,

> hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through the public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

(Brandeis, J., concurring) (footnote omitted).

Recognizing the tension between efficient government, the demands of the patronage system, and the First Amendment rights of public employees, the Court in Elrod held that nonconifidential and nonpolicymaking employees of the Cook County, Illinois Sheriff's Office could not be discharged when the sole reason for their dismissal was their political affiliation. 427

U.S. at 367-68. In Branti, however, the Court stated that in patronage dismissal cases "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. Thus, although defendants argue for the continued vitality of the "policymaking--confidential" test, the Court's rather unequivocal language in Branti would appear to signal a switch to an appropriateness of political affiliation requirement approach. See Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982) (Court adopts and applies the "appropriateness of party affiliation

requirement" analysis).

Thus, under the law as it exists today, plaintiffs must make out a prima facie case by proving that political reasons were the sole motivating factor behind their discharge.[3] The burden of going forward with evidence then shifts to defendants who may show 1) that plaintiffs would have been discharged in any event for other reasons, or 2) that political affiliation is an appropriate requirement for plaintiffs' former positions. See Ecker v. Cohalan, 542 F.Supp. 896, 900 (E.D.N.Y. 1982).

a) Motivation for Discharge

The Court's review of the record in this matter leads convincingly to the conclusion that plaintiffs were discharged solely for political reasons. First, plaintiffs were discharged three days after defendant Bosley had been sworn in and on the second working day of Bosley's administration. Second, defendant Bosley wrote to Judge Gaertner of the Circuit Court on December 28, 1982, regarding the potential discharge of plaintiffs (although they were unnamed in the letter) before Bosley's transition team had interviewed several of the plaintiffs. Plaintiffs' Exhibit 43. This belies defendants' assertion that the decsion to terminate plaintiffs was made only after an

examination of plaintiffs qualifications. Third, the interviews that were conducted with plaintiffs Barnes and McElroy did not touch to any significant extent upon plaintiffs' qualifications, job histories, or like factors. Plaintiffs' Exhibit 42A, B. Fourth, it was well known to all that plaintiffs were very close political affiliates of Joseph Roddy. Fifth, defendant Bosley's termination letters to plaintiffs McElroy and Barnes stated they were being fired from their "policymaking and/or confidential position[s]." This indicates that defendants knew and recognized that they were firing plaintiffs for political reasons because of defendants' inclusion of the Elrod-excepted language. Last, defendant Bosley made several public

statements immediately following his election that he had the desire and the right to bring "his own team" to the Circuit Clerk's Office. After consideration of all these factors, the Court believes plaintiffs have demonstrated that they were discharged solely for political reasons.[4]

b) Other Reasons for Discharge

At trial defendants attempted to prove that plaintiffs were incompetent

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[4] Defendants' contention that this is not a case covered by the doctrine of Branti and Elrod because Roddy and Bosley were both Democrats is specious. Ecker v. Cohalan, 542 F.Supp. 896 (E.D.N.Y. 1982) does not turn on this issue. Nor would it make sense to risk the emasculation of constitutional protections in geographic areas in which the only real contest occur at the primary level. The Court takes judicial notice of the fact that currently the Democratic Party is firmly in control of political offices within the City of St. Louis. Fed.R.Evid. 201.

to perform adequately the duties of their respective positions. Defendants obviously did so in order to demonstrate that plaintiffs were or would have been discharged from their jobs for reasons unrelated to their political affiliation. Defendants presented the testimony of Freeman Bosley, Jr. that in his estimation plaintiffs were lacking in the appropriate skills, knowledge, and education. Defendant Bosley also testified that his campaign pledge was to bring better management to the Circuit Clerk's Office and that he felt the replacement of plaintiffs was essential for the realization of this goal. Defendants also presented testimony on the generally good qualifications of the people which defendants put in plaintiffs' former

positions.

The Court finds that the weight of the credible evidence demonstrates that all plaintiffs were competent employees. Employee evaluations were always above average for all three plaintiffs. Additionally, letters of commendation appear in several instances in their personnel files. Plaintiffs' attendance records all appear to be in order, and with one minor exception there are no negative reports on any of the plaintiffs. Further, each appears to have sufficient educations to enable them to perform the duties of their respective positions, and perhaps more importantly, each has been employed in the Circuit Clerk's Office for a good number of years. Finally, each

plaintiff has received a substantial number of promotions during his or her tenure with the Clerk's Office. Accordingly, the Court concludes that defendants have failed to show that nonpolitical reasons motivated plaintiffs' dismissals or would have prompted their dishcarge in any event. That defendants' replacements are arguably better qualified does not make plaintiffs unqualified.

c) Appropriateness of Political Affiliation Requirement

The last element of the analysis involves a determination of whether defendants have demonstrated that political affiliation is an appropriate requirement for the positions that plaintiffs formerly held.[5] As discussed above, the purpose of this exception to the no-discharge rule is to strike the proper balance between the competing concerns of employees' First Amendment rights and government

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[5] Defendants' attempt to demonstrate that no one ever requested plaintiffs or others to alter their political allegiance is unavailing. Branti makes it quite clear that plaintiffs need not prove actual or overt coercion on the part of defendants. 445 U.S. at 516-17, 100 S.Ct. at 1293-94.

efficiency in implementing the policy goals of new administrations. See Elrod, 427 U.S. at 367-68, 96 S.Ct. at 2686-87. Above all, it remains strikingly clear that it is defendants' burden to come forward with evidence demonstrating that political affiliation is an appropriate requirement for plaintiffs' positions. Branti, 445 U.S. at 518, 100 S.Ct. at 1294; Elrod, 427 U.S. at 368, 96 S.Ct. at 2687; Ecker, 542 F.Supp. at 900.

Defendants expended considerable effort at trial in an attempt to show that all three plaintiffs were "policymakers" or occupied "confidential" positions. This evidence was adduced mainly in the form

requirement. 445 U.S. at 518, 100 S.Ct. at 129.[6]

As Branti makes abundantly clear, the question is whether political affiliation is an appropriate requirement for the positions held or

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[6] Indeed, some of the evidence introduced by defendants on the issue of whether plaintiffs are excepted from the Elrod-Branti protections was in the form of memoranda written by plaintiffs McElroy and Barnes concerning mailing procedures, the wearing of blue jeans by office employees, and the ordering of office supplies. Even assuming arguendo that this evidence indicates that plaintiffs are "policymakers", it does not support the proposition that political affiliation is an appropriate requirement for the positions occupied by plaintiffs McElroy and Barnes. Much like the Court's example of the football coach in ,Branti, no one can seriously claim that a Bosley Democrat could better regulate the wearing of blue jeans than a Roddy Democrat. 445 U.S. at 518, 100 S.Ct. at 1294.

formerly held by plaintiffs. The Missouri Supreme Court has promulgated rules and regulations for the administration of the state court system. Administrative Rule 7 (Joint Exhibit 1) sets out a staffing policy along with job descriptions.

With respect to plaintiffs McElroy and Barnes, the Court finds that political affiliation is not an appropriate requirement for their positions. Plaintiff McElroy was a Unit Manager II in the Operations Department of the Clerk's office. While the Rule 7 of the job description for this position indicates that the occupant has some discretion, it is clear that a Unit Manager is nothing more than a high level

manager/supervisor. The job duties are narrowly defined. Further, Rule 7 states clearly that a Unit Manager II operates under the supervision of the Circuit Clerk.

Plaintiff Barnes was a Unit Manager I at the time of her discharge. According to Rule 7 her job duties were similar to those of plaintiff McElroy. The only real difference is that a Unit Manager II normally "exercises[s] ... greater discreation and [manages] larger and more complex organizational structures ..." Joint Exhibit 1 at V-19. As mentioned above, both Barnes and McElroy could be considered high level managers and supervisors with responsibility over a large number of people. Both could be considered to be

vested with a slight degree of discretion in managing their respective departments. Both, however, were for the most part constrained to follow the extensive guidelines in Rule 7 and both were under the supervision and direction of the Circuit Clerk.

In light of this evidence, the court cannot say that political affiliation is an appropriate requirement for the positions of Unit Manager I or II. Certainly it is not listed in Rule 7 as a qualification for those positions. In the Court's view, the only appropriate requirements for those positions are those that deal with ensuring sound management and supervisory skills on the parts of those who hold the positions. The

reason why Elrod created the policymaking exception, later modified by Branti, is to ensure the efficient working of government. The Supreme Court recognized that new administrations need to have loyal people in some positions so that the new administrations need to have loyal people in some positions so that the new administration may carry out the polilcies for which the electorate voted. Elrod, 427 U.S. at 367, 96 S.Ct. at 2686. The emphassis in Elrod was on ensuring that the rule formulated in that case did not result in insulating from discharge those employees who were in positions to thwart the policies of the new administration. Id. The Court is convinced that neither McElroy nor

Barnes occupied positions such that would enable them to undercut the policies of the Bosley administration.[7]

[7] Defendants argue that plaintiffs McElroy and Barnes had sensitive, highly policymaking duties, notwithstanding the apparent limits of their job duties, due to their relationship with Joseph Roddy. This does not alter the Court's decision because Circuit Clerk Bosley can simply choose not to bestow such additional duties on McElroy or Barnes.

Nor is it a sound argument in defendants' favor that plaintiffs were hired as patronage employees and thus should have expected to be discharged with the election of a new Circuit Clerk. The Supreme Court has rejected such "waiver" arguments in both Branti, 445 U.S. at 512 n 6, 100 S.Ct. at 1291 n 6, and Elrod, 427 U.S. at 359-60 n. 13, 96 S.Ct. at 2682-83 n. 13. Although the result here may seem incongruous or harsh inasmuch as employees hired under the former freewheeling patronage system are protected from dismissal, see Ecker, 542 F.Supp. at 903, the fact that First Amendment violations were suffered lightly in the past does not lessen the need for enforcement of the Amendment today.

The Court's conclusions are different, however, with respect to plaintiff Thomas. Testimony at trial indicated that as Administrative Assistant I, Thomas had no narrowly defined job duties, see Elrod, 427 U.S. at 368, 96 S.Ct. at 2687, and was a trusted confidant of the former Circuit Clerk. Mr. Thomas testified that as Administrative Assistant I he spent all his working time in the Clerk's office. Further, the Rule 7 description of the postiion of Administrative Assistant I indicates that the occupant is to "[relieve] the circuit clerk ... of administrative detail." Joint Exhibit 1 at V-12. He or she is responsible for various administrative tasks, and must exercise "initiative and independent judgment ... within a broad

framework of existing policies." Id. Further, the description indicates that an Administrative Assistant I. The Court believes that a person who disagrees with the beliefs and policies of an incoming Circuit Clerk and who occupies the position of Administrative Assistant I could indeed hamper the implementation of the policies the new clerk was elected to carry out.

One factual circumstance, however, prevents this matter from being an ordinary Branti-type case with respect to plaintiff Thomas. After Circuit Clerk Bosely's election, but before he took office, plaintiff Thomas was transferred to the position of Court Clerk III, a predominantly ministerial position. This transfer was effective

December 17, 1982, approximately two weeks before Mr. Bosley was to take office. The transfer took place at no reduction in plaintiff Thomas's salary and was done admittedly to "protect" Thomas's job. Obviously, Mr. Roddy and plaintiff Thomas were aware of the Supreme Court's Branti and Elrod decisions. When Thomas was transferred to Court Clerk III, the occupant of that position, Ralph Layton, a Bosley supporter, was made Mr. Roddy's Administrative Assistant I. The novel issue here is whether the court should consider plaintiff Thomas's old position as Administrative Assistant I or his new position as Court Clerk III in determining whether political affiliation is an appropriate requirement for the position he held.

The Court believes that Thomas's lateral transfer to Court Clerk III should be disregarded for purposes of the analysis here. The timing of the transfer, the fact that no pay was involved, and Ralph Layton's status as a Bosley supporter buttress the inference that the transfer was accomplished to circumvent the Branti exception to the no discharge rule. The Court notes that Thomas was transferred to a nonvacant protected position which resulted in Layton's transfer to a nonprotected position. This attempted subterfuge cannot be abided, however, because the potential exists for persons in protected postitions to be transferred to vulnerable nonprotected positions at the

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risk of losing their jobs. Certainly, this was not an intended result of Branti and Elrod. The Court notes that the situation might well be different in cases in which the nonprotected employee is transferred to a vacant protected position. In such a situation no innocent employee would suffer the risk of losing his or her job as a result of the transfer, and the employee transferred to the protected job would not be in a position to thwart the policies of the new administration.

In summary, the Court finds that all plaintiffs were discharged solely for political reasons and that none would have been discharged for other, legitimate causes. Further, plaintiffs

McElroy and Barnes occupied positions for which the requirement of political affiliation was not appropriate, while plaintiff Thomas occupied a position for which political affiliation was an appropriate requirement.

d) Relief

Plaintiffs Barnes and McElroy are entitled to certain relief on their First Amendment claim against both defendants in their official capacities. There was sufficient evidence to indicate that both defendant Carter and defendant Bosley were involved in the decision to terminate plaintiffs.

Certainly, plaintiffs McElroy and Barnes are entitled to declaratory and injunctive relief inasmuch as the Court has found that defendants violated their First Amendment rights. Additionally, plaintiffs request reinstatement with full backpay and benefits including the restoration of service time, health and pension

benefits. This is the relief that would best make plaintiffs whole and compensate them for the injury caused by defendants' First Amendment violation and is also within the Court's authority to award. Kingsville Independent School Dist. v. Cooper, 611 F.2d 1109, 114 (5th Cir. 1980). As a prevailing party, both McElroy and Barnes are entitled to attorney's fees under 42 U.S.C. Section 1988. The Court will order plaintiffs to submit their affidavits for attorneys'fees within seven days of the date of this Memorandum. Plaintiffs should include an hourly rate and a detailed index of attorney time spent on the First Amendment portion of their cases.

As to plaintiffs claim for compensatory and punitive damages for

alleged emotional distress, the Court finds that plaintiffs' claims were not sufficiently proven. Plaintiffs testified that they were embarrassed and humiliated because of their discharges, but this is clearly an insufficient basis for claims of emotional distress caused by constitutional violations. Nekolny v. Painter, 653 F.2d 1164,1172 (7th Cir. 1982).

II. Due Process

Although it was not a major portion of their case, plaintiffs attempted to prove that defendants'actions deprived them of a property right in continued employment without due process of law.

Under the established Due Process

analysis one must consult state law to determine the existence and dimensions of alleged property interests. Roth v. Board of Regents, 408 U.S. 564,577,92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Plaintiffs must prove that they have some legitimate expectation of continued employment and that they are more than employees at will. Bishop v. Wood, 426 U.S. 341, 345-46, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976).

Plaintiffs candidly admit that they have no binding agreement with the State of Missouri that would give them a reasonable expectation of continued employment. Additionally, no statutory source of such an expectation has been demonstrated to the Court. Plaintiffs' sole source of their alleged property interest seem to be Administrative Rule

7.01A which defines "permanent employees" as those with no set expiration term for their appointments. Under Rule 7, an employee who successfully completes a probationary period becomes a permanent employee.

The Court believes plaintiffs had no legitimate expectation of continued employment. No contract or statute would provide this, and Rule 7 merely makes the appointments of Circuit Clerk employees open-ended. If anything, Rule 7 would indicate that employees have no fixed tenure in their positions. Missouri law is clear that in the absence of a contract for a definite term of employment or a statutory source creating such a term, an employee serves at the will of his employer. See Amaan v. City of Eureka,

615 S.W. 2d 414, 415 (Mo. 1981) (en banc). Plaintiffs have failed to show they were deprived of a property right by defendants, and accordingly, the Court will enter judgment for defendants on Plaintiffs' Due Process claims.

III. Sections 1985 and 1986

Although pleaded in their complaint, plaintiffs presented very little evidence on their Sections 1985 and 1986 claims. At any rate, plaintiffs have failed to prove that they were the victims of racial or class based discrimination, one of the elements of an action under Section 1985(3). Griffin v. Breckenridge, 403 U.S. 898, 102, 91 S.Ct. 1790, 1798, 29 L.Ed. 388 (1971). Because a Section 1986 claim

depends on the existence of a valid Section 1985 claim, Williams v. St. Joseph Hospital, 629 F.2d 448 (7th Cir. 1980), plaintiffs' Section 1986 is meritless as well. Accordingly, the Court will enter judgment in favor of defendants on plaintiffs' Sections 1985 and 1986 claims.

Office - Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS.
CLERK

NO. 84-1308

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1984

FREEMAN (TEEK) BOSLEY, JR., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis,

Petitioners,

v.

SHIRLEY BARNES, FRANCES J. McELROY, and MURRELL THOMAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

POINT I

WHETHER PETITIONER'S CONTENTION THAT FIRING COMPETENT EMPLOYEES SOLELY BECAUSE OF THE MANNER IN WHICH THEY EXERCISED THEIR RIGHTS OF ASSOCIATION IS PERMISSIBLE IN CERTAIN CIRCUMSTANCES.

POINT II

WHETHER A DISCHARGED PUBLIC EMPLOYEE MUST PROVE THAT HE WAS FIRED SOLELY BECAUSE OF HIS POLITICAL AFFILIATION OR WHETHER PROVING THAT HIS POLITICAL AFFILIATION WAS A SUBSTANTIAL MOTIVATING FACTOR IS SUFFICIENT.

POINT III

WHETHER THE BALANCING REQUIRED BY THE OPINION IN PICKERING V. BOARD OF EDUCATION, 391 U.S. 563 (1968) IS APPLICABLE PRIMARILY TO FREE SPEECH CASES, OR WHETHER IT IS APPLICABLE TO A CASE SUCH

AS THIS, WHICH CONCERNS A FIRING OF COMPETENT PUBLIC EMPLOYEES WHICH WAS MOTIVATED SOLELY BY THE MANNER IN WHICH THE EMPLOYEES EXERCISED THEIR RIGHT OF ASSOCIATION.

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NO. 84-1308

IN THE SUPREME COURT OF THE
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OCTOBER TERM 1984

FREEMAN (TEEK) BOSLEY, JR., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis,

Petitioners,

v.

SHIRLEY BARNES, FRANCES J. McELROY, and MURRELL THOMAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Petitioners' statement of the case does not constitute a truthful, clear, definite and complete disclosure concerning the controversy before the Court. Petitioners instead are attempt-

ing to re-argue the evidence which they presented at trial. The only facts properly before this Court are those ultimate findings which have been affirmed by the Eighth Circuit. Pertinent excerpts of the Appelate Court's findings in Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984) follow:

> Upon reviewing the evidence introduced at trial, we are convinced the trial court did not clearly err in its finding that political motives prompted the plaintiffs' dismissals. The court cited the following factors to support its finding: (1) the plaintiffs were discharged three days after Bosley was sworn in; (2) Bosley wrote to a judge on the circuit court regarding the discharge of the plaintiffs (although they were unnamed in the letter) before they were interviewed by the transition team; (3) the transition team interviews with Barnes and McElroy did not touch to any significant extent upon the plaintiffs' qualifications or job history; (4) the plaintiffs were close political affiliates of Roddy; (5) the termination letter stated the plaintiffs were being terminated from "policymaking and/or nonconfidential position[s];"

and (6) Bosley made public statements to the effect that he had the desire and right to bring his own team into the clerk's office. Barnes v. Bosley, 568 F.Supp. 1406, 1410 (E.D.Mo. 1983).

The defendants dispute the significance of these factors, maintaining that Bosley fired the plaintiffs because he thought his own management team was better qualified and could do a better job. They point out that the transition team interviewed over forty employees in the Clerk's Office including Barnes and McElroy and studied the operations of the office. In addition, several former Roddy supporters still hold jobs in the Clerk's Office and have not been pressured to change their party allegiances.

[4] We nonetheless believe that the evidence is sufficient to uphold the district court's finding. It is evident from the record that Bosley and his transition team gave the plaintiffs' qualifications cursory treatment. The transition team questionnaires for Barnes and McElroy show only a few questions were asked. The team did not interview Thomas at all. Bosley talked to the plaintiffs on January 3 and asked them to submit resumes, but fired them on January 4 before they could submit them. Furthermore, the district court found the plaintiffs were competent in their positions, citing their many years of satisfactory service accompanied

> by a substantial number of promotions. The court also found the plaintiffs had sufficient education to perform the duties of their respective positions.

Barnes, supra at 506-507.

Additionally, the transition team members (all of whom were opposed to the candidate with whom plaintiffs were affiliated) were appointed by Bosley to the positions previously held by plaintiffs. Barnes, supra at 504.

> In weighing the defendants' evidence, the district court looked at the plaintiff's long years of satisfactory service and the type of skills required by their jobs. The court concluded that the plaintiffs were in fact experienced and competent employees and that they would not have been discharged if they had not been longtime political supporters of the previous clerk. In our view, this finding is not clearly erroneous. . . . we believe the district court did not err in finding the plaintiffs' political affiliation was not important to the positions they held. Like the public defenders in Branti and the football coach in the Court's example in that case, these plaintiffs' political viewpoints would not in-

fluence policymaking in the areas within their discretion. Because the plaintiffs proved the two elements essential to their cases, we affirm the district court's judgment in favor of Barnes and McElroy.

[9] For the same reason, we reverse the district court's judgment against Thomas. The only factor distinguishing Thomas's case from the cases of the other two plaintiffs is that he was transferred to a predominantly ministerial position from his position as second in command to the clerk just before Bosley took office. The district court disregarded the transfer because it was done to avoid possible dismissal, and it put the person who was transferred into Thomas's old job in jeopardy of dismissal for political affiliation. Neither of these reasons persuade us that the Branti and Elrod analyses should not be applied to Thomas's case. Thomas was dismissed because of his political affiliation, even though political affiliation had no relevance to the ministerial position he held at the time Bosley took office. How Thomas got that position is irrelevant. Bosley could have dismissed him as incompetent, or lowered his salary if he thought it was too high for the position Thomas held. Bosley could not, however, dismiss Thomas for political reasons. Since that is what the district court found was

> done, Thomas must succeed in his action.

Barnes, supra at 508.

On page 11 of the petition for writ of certiorari the petitioners assert that "The District Court recognized that the replacements were "better qualified". The foregoing is neither an accurate nor a truthful rendition of the trial court's decision. The decision merely said "That defendants' replacements are arguably better qualified does not make plaintiffs unqualified." Barnes v. Bosley, 568 F.Supp. 1406, 10-11 (E.D. Mo. 1983) (emphasis added).

On page 13 of the petition for writ of certiorari by implication petitioners assert that the Eighth Circuit overturned the trial court's finding (that the plaintiffs were fired solely because of their political affiliation) and

substituted in its stead their own finding, i.e. that political affiliation was the motivating factor. That is not an accurate reading of the case. The Eighth Circuit in Barnes v. Bosley, 745 F.2d 501, 507 (8th Cir. 1984) states "that the evidence is sufficient to uphold the district court's findings." The district court finding reads as follows: "After consideration of all these factors, the Court believes plaintiffs have demonstrated that they were discharged solely for political reasons." Barnes v. Bosley, 568 F.Supp. 1406, 1410 (E.D. Mo. 1983) (emphasis added).

It follows that questions concerning the appropriateness of the application of the Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1974) "substantial or motivating factor" test which is discussed

in the Eighth Circuit opinion, Barnes v. Bosley, 745 F.2d 501, 7 (8th Cir. 1984) are not properly before this Court.

Respondents respectfully suggest that these questions are not before this Court for the reasons that: the finding of fact affirmed on appeal is that plaintiffs were fired solely because of their political affiliation; discussion of the Mount Healthy test in the Eighth Circuit's opinion was dicta. Thus, resolution of conflicts among the Circuits, if any exist concerning the application of the Mount Healthy test to politically motivated firing cases, is not properly before the Court. Respondents suggest it is not before the Court because plaintiffs were fired solely as a result of their political affiliation. Hence, it is not necessary for the Court to consider this question in order to re-

solve the instant case.

RESPONSE TO PETITIONERS' INTRODUCTION AND REASONS FOR DENYING WRIT

Petitioners, in their introduction, urge this Court to grant their Writ of Certiorari by falsely and improperly alleging the existence of a conflict between the decisions of the various circuits. The cases cited by petitioners do not sustain that proposition. On the contrary, they are in harmony with one another and support the decision of the Eighth Circuit in the instant case.

A review of the applicable law in the cases cited by petitioners follows. Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980) is a mixed-motive firing case. In that case the Fifth Circuit applied the Mount Healthy substantial

motivating factor test. Tanner, supra at 1192.

Wren v. Jones, 635 F.2d 1277 (7th Cir. 1980), is also a mixed-motive case. The court in Wren on page 1283 states in essence that the unusual facts of that case preclude a finding that political motivation was the sole basis. The Wren court applies the following test:

> Where, as in the case at bar, political association was not the sole basis for a personnel transaction, the Mt. Healthy test should be applied . . .

Wren, supra at 1286.

Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), is also a mixed-motive case. The Nekolny court applies the Mount Healthy test on page 1168.

In Landry v. Farmer, 564 F.Supp. 598, 604 (R.I. 1983) a district court finds:

> . . . that the Mount Healthy test for proving a First Amendment violation survives Branti. Branti did not address the burden of proof question and the Court does not read it as requiring a plaintiff to prove that he was discharged solely for the reason that he was not affiliated with or sponsored by the political party in office. Branti and Elrod established that the discharge of a public, nonpolicymaking employee based solely on his political affiliations is constitutionally impermissible. Their holdings are important because they make clear that the First Amendment protects a public employee from discharge not only based on what he says, see Connick v. Myers, ___ U.S. ___, ___ ___, 103 S.Ct. 1684, 1687-93 (1983).

Bever v. Gilbertson. 724 F.2d 1083, 1089 (4th Cir. 1984), is not a mixed-motive case; thus the analysis in Wren, supra, was not applied. The Bever court simply stated that on the facts of that case the Elrod-Branti principle is clearly applicable.

The conflict among the Circuits alleged by petitioners does not exist.

The cases cited by petitioners apply the Mount Healthy standard in mixed-motive cases. Bever, the only non-mixed motive case which was cited by petitioners applied the Elrod-Branti principle. This authority is on all fours with the decision and the dicta in the case at bar. In mixed-motive cases the Mount Healthy test is applied; in solely for political motive cases, the Elrod-Branti principle is applied.

POINT I

PETITIONERS' CONTENTION THAT FIRING COMPETENT EMPLOYEES SOLELY BECAUSE OF THE MANNER IN WHICH THEY EXERCISED THEIR RIGHTS OF ASSOCIATION IS PERMISSIBLE IN CERTAIN CIRCUMSTANCES IS ENTIRELY WITHOUT MERIT.

The ultimate facts before this Court are: that plaintiffs were experienced and competent employees who were discharged solely because of their poli-

tical affiliations, and that political affiliation was not important to the positions they held. Barnes v. Bosley, 745 F.2d 501, 508 (8th Cir. 1984).

This Court in Elrod v. Burns, 427 U.S. 347 (1976), has already examined the question raised by petitioners in this point. The Court found that:

> Patronage dismissals thus are not the least restrictive alternative to achieving the contributions they may make to the democratic process. The process functions better without the practice, perhaps even better, for patronage dismissals clearly retard that process.

Elrod, supra at 169-70.

> In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end.

Elrod, supra at 372.

Because of the "vital need for government efficiency and effectiveness"

the Court in Elrod, supra at 372, permitted patronage dismissals of policymaking employees. In Branti v. Finkel, 445 U.S. 507, 518 (1980), this Court abrogated the Elrod policymaking exception.

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

In a case such as the one at bar, petitioners can not in good faith argue, as they do on page 30 of their petition, that under either Elrod or Branti dismissals solely motivated on a basis of political association can ever constitute the least restrictive means to achieve legitimate governmental goals. This argument can not be made in good faith by petitioners because they are

precluded from doing same by the ultimate finding of fact, "that plaintiff's political affiliation was not important to the positions they held." Barnes v. Bosley, 745 F.2d 501, 508 (8th Cir. 1983) (emphasis added).

The petitioners also urge this Court to apply the Pickering v. Board of Education, 391 U.S. 563, 568 (1968), compelling state interest test to the facts of the case at bar. The rule in Pickering, though, is not applicable to the case before this Court for the reasons that: Pickering is a free speech case; the instant case hinges on a violation of freedom of association. The instant case is on all fours with the facts in Elrod and Branti which were both freedom of association cases.

The Fifth Circuit has recently surveyed the Supreme Court authority in

this area, and has concluded that:

> Elrod and Branti, we think, lie at the extreme of the employee's side, where little, if any, weighing is called for. There employees who were, it appears, both loyal and effective were discharged on the sole ground of their private and--for employment purposes -all but abstract political views. They did not campaign, they did not even speak: they merely thought. No countervailing considerations appear; they suffered discharge for pure political beliefs, a circumstance that explains the comparative absence of "weighing" terminology in these opinions.

McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984). This Court has in essence said in Elrod at 362 and in Branti at 517 that weighing is not permitted in freedom of association cases.

For all the foregoing reasons, respondents respectfully suggest that the arguments of petitioners under Point I are without merit as a matter of law.

POINT II

THE QUESTION WHETHER A DISCHARGED PUBLIC EMPLOYEE MUST PROVE THAT HE WAS FIRED SOLELY BECAUSE OF HIS POLITICAL AFFILIATION OR WHETHER PROVING THAT HIS POLITICAL AFFILIATION WAS A SUBSTANTIAL MOTIVATING FACTOR IS SUFFICIENT IS NOT BEFORE THIS COURT BECAUSE THE FINDING THAT PLAINTIFFS WERE FIRED SOLELY BECAUSE OF THEIR POLITICAL AFFILIATION IS THE ULTIMATE FINDING OF FACT WHICH IS BEFORE THIS COURT.

Petitioners' formulation of their second point presented is clearly based upon an erroneous interpretation of this Court's opinions in Elrod and Branti and of the Court of Appeals opinions which petitioners cited in Point II. In both Elrod and Branti, cases wherein plaintiffs had been discharged solely because of their political affiliation, this Court decided that a government employee can not be discharged on that basis. There is no mention of balancing in either case. Elrod formulated a policy-maker exception to the blanket prohibi-

tion. Elrod, supra at 375. Branti abrogated that exception by requiring the employer to "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Branti, supra at 517-18.

Neither case permits a balancing of the government's interest with those of the "employee who is discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." Elrod, supra at 375 (emphasis added). In the case at bar, the ultimate finding of fact touching on this issue is that plaintiffs were competent employees who were fired solely because of their political affiliation. Thus, under the holdings in Elrod and Branti, balancing is prohibited.

The Court does not have before it a

mixed-motive case. But even if it did, the law of the cases cited by petitioners would not sustain their contention that there exists a conflict among the circuits. As previously discussed in the Response to Petitioners' Introduction, the Circuits are in harmony with one another. In mixed-motive cases they apply the Mount Healthy substantial motivating factor test.

For the foregoing reasons, the writ should be denied as to point II.

POINT III

THE BALANCING REQUIRED BY THE OPINION IN PICKERING V. BOARD OF EDUCATION, 391 U.S. 563 (1968) IS APPLICABLE PRIMARILY TO FREE SPEECH CASES. IT IS NOT APPLICABLE TO A CASE SUCH AS THIS, WHICH CONCERNS A FIRING OF PUBLIC EMPLOYEES WHICH WAS MOTIVATED SOLELY BY THE MANNER IN WHICH THE EMPLOYEES EXERCISED THEIR RIGHT OF ASSOCIATION.

The balancing required by this Court in Pickering is primarily

applicable to public employee free speech cases. Pickering and its progeny are not applicable to a case such as the one before the Court. The respondents (plaintiffs) were discharged solely because of the manner in which they chose to exercise the right of freedom of association. The instant case is on all fours with the facts in Elrod and Branti.

Elrod requires that a significant impairment of First Amendment rights must survive exacting scrutiny. Elrod, supra at 362.

Branti requires an employee's First Amendment rights to yield only where the state can show a vital interest in maintaining government effectiveness and efficiency--hardly a balancing test. Branti, supra at 517.

Neither Elrod nor Branti would

permit the balancing sought by petitioners. As was noted earlier in this brief in opposition, the Fifth Circuit has recently surveyed the Supreme Court authority in this area, and concluded that:

> Elrod and Branti, we think, lie at the extreme of the employee's side, where little, if any, weighing is called for. There employees who were, it appears, both loyal and effective were discharged on the sole ground of their private and--for employment purposes--all but abstract political views. They did not campaign, they did not even speak: they merely thought. No countervailing considerations appear; they suffered discharge for pure political beliefs, a circumstance that explains the comparative absence of "weighing" terminology in these opinions.

McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984).

For all the foregoing reasons, respondents respectfully suggest that the arguments of petitioners under Point III are without merit as a matter of law.

CONCLUSION

For all the foregoing reasons, plaintiffs-respondents respectfully submit that the judgment of the Eighth Circuit Court of Appeals, below, is entirely correct and that the same does not warrant review by this Court. For that reason it is further respectfully submitted and urged that petition for writ of certiorari in the instant case should be denied.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

The undersigned certifies that the served three copies of the foregoing on defendants-petitioners Bosley and Carter by mailing same to the office of their attorneys, Lloyd J. Jordan and Charles L. Bussey, 721 Olive, Suite 515, St. Louis, Missouri 63101, First Class Postage prepaid, on this 13th day of March, 1985.

Thomas F. Bauer

Office - Supreme Court, U.S.
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NO. 84-1308

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1984

FREEMAN (TEEK) BOSLEY, JR., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis,

Petitioners,

v.

SHIRLEY BARNES, FRANCES J. McELROY, and MURREL THOMAS,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

I. CLARIFICATION OF THE PROPER ROLE OF THE FINDERS OF FACT AND LAW IN FIRST AMENDMENT CASES WHERE POLITICAL AFFILIATION IS ALLEGED

Rule 52(a) of the Federal Rules of Civil Procedure sets forth the scope of review on findings by the District Court:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Referred to as the "clearly erroneous" rule, considerable case law has interpreted and its delimited application. This rule has not been interpreted to preclude the review of findings of fact. See 9 WRIGHT AND MILLER, CIVIL PROCEDURE SECTION 2585. Although the "clearly erroneous" rule may be applicable to findings of fact, it is not applicable to questions of law. 5A MOORE'S FEDERAL PRACTICE SECTION

52-76(2). Nor is it applicable to rulings that involve mixed questions of law and fact. Pullman - Standard v. Swint, 102 S.Ct. 1781, 1790; 72 L.Ed. 66 (1982); 9 WRIGHT AND MILLER, CIVIL PROCEDURE Section 2589. Further, findings made by the District Court which are based upon inferences drawn from documentary and/or undisputed facts can be set aside. Air Terminal Cab, Inc. v. United States, 478 F.2d 575, (8th Cir. 1973), cert. denied 414 U.S. 904, 94 S.Ct. 228, 386 L.Ed. 2d 146 (1973).

Respondents in their Brief in Opposition adopt the position that the findings of the District Court are conclusive and not properly before this Court for review. Respondent has, however, failed to make a distinction between findings of fact, legal findings, and mixed findings of fact and law. The

instant case involves errors of law and errors of mixed fact and law.

(a) Findings of Mixed Fact and Law

The present state of First Amendment law where Elrod-Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980) is applied requires that the Court's analysis involve three steps. In the first step, the Court interprets the facts to decide which legal standard should be applied to the case. Step two involves the selection of that standard either the "sole motive" or the Mount Healthy test. Mount Healthy City School Board of Education v. Doyle, 429 U.S. 274 (1974). In step three, the fact finder (in this case the Judge) applies the legal standard to these facts. Finally, in step four the fact finder reaches a legal conclusion. Where a case, is tried before the Court as opposed to a jury,

the findings made by the Court involve mixed findings of fact and law as the Court interprets the facts twice to reach the ultimate legal conclusion. The problem arises, however, when the court makes a legal finding, that the "sole motive" test applies. The court in deciding to apply the "sole motive" test reaches the legal conclusion that should be made in step four, and thus step three is omitted. This omission in the legal analysis made by the fact finder (Judge) is an error of mixed fact and law and is thus properly before this court for review.

In the instant case, the Court decided to apply the Elrod-Branti test. In its decision the District Court states:

> The Supreme Court in Elrod and Branti established the doctrine that public employees cannot be fired on account of their political beliefs.

568 F. Supp. at 1408. Thus the Court had to reach the legal conclusion that they were terminated because of their political beliefs before applying the Elrod-Branti test to the facts. Because of the inherent bias in this test against the Defendants, this Court must address this problem by setting forth factors which a court must consider in interpreting the facts to reach a legal conclusion that the "sole motive" or the Mount Healthy tests apply. Under the present Elrod-Branti analysis, mere allegations of discharge by political association is certain to result in a finding for the plaintiff.

(b) Findings Based on Documentary Evidence and/or Undisputed Facts

Findings of the trial court which are based upon inferences as drawn from documentary evidence and/or undisputed

facts can be set aside. Air Terminal Cab, Inc. v. United States, 478 F.2d 575 (8th Cir. 1973).

In the case at bar, the District Court erroneously placed significance on certain facts:

1) plaintiffs' discharge three days after the defendant was sworn in;

2) defendant Bosley's letter to Judge Gaertner of the Circuit Court;

3) plaintiffs political affiliation with the former Clerk Roddy.

4) the termination letter's characterization of plaintiffs positions as "policy-making and/or confidential."

5) Bosleys' public statements to the effect that he had the desire and the right to bring in "his own team".

These facts, relied on by the trial court, were based upon the Court's inferences drawn from documentary evidence: the letter to plaintiffs and

the letter to the Judge and the Court's inferences drawn from other facts: the date of discharge of the plaintiffs, plaintiffs' political affiliation, and public statements made by Petitioner Bosley.

The significance placed upon, and the inferences drawn from this evidence by the District Court were erroneous. The fact that the Petitioner replaced the plaintiffs with better qualified persons, as acknowledged by the District Court would negate a finding of sole motive. Petitioners have set forth in their Petition for Writ of Certiorari additional countervailing factors which the District Court failed to take into account.

II. CONFLICT AMONG THE CIRCUITS EVIDENCES THE NEED FOR UNIFORMITY IN FIRST AMENDMENT LAW AND PRESERVATION OF THE VITAL PUBLIC INTEREST IN EFFICIENT AND EFFECTIVE GOVERNMENT

Respondent, in his brief at pages nine through twelve, incorrectly characterizes Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980); Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981); and Landry v. Farmer, 564 F.Supp. 598 (D.C. R.I. 1983) as "mixed motive" cases. Respondent appears to label any case where the Mount Healthy test is applied as a "mixed motive" case. This interpretation of First Amendment law is inaccurate, as the term "mixed motive" applies to the burden of proof; it is not a conclusion of law.

In Tanner v. McCall, supra the Fifth Circuit referred to the allocation of the burden of proof. It approved of the application of Mount Healthy as the proper method of allocating the burden of proof, however; this its approval not constitute a finding of "mixed motive".

Further, the Court addressed the problem of the legal standard in McBee v. Jim Hogg County, 730 F.2d 1009, 1014 (5th Cir. 1984) (en banc) and concluded that the Pickering balance test was the appropriate legal standard to apply in First Amendment cases. By citing Connick v. Meyers, 46 U.S. 138, 103 S.Ct. 1084 (1983), a free speech First Amendment case, the McBee court removed any doubts that First Amendment free speech precedent lacks broader First Amendment application.

Nor did the Seventh Circuit in Nekolny v. Painter, supra make a legal finding of "mixed motive"; rather there, the court rejected outright any application of a "sole motive" standard in its burden of proof analysis:

> We must reject the defendant's suggestion that we adopt a "sole motive" test . . . to require that the plaintiff prove that the

> protected conduct was the "sole motive" for his termination would, in our view, run the risk of not adequately protecting victims of First Amendment violations.

653 F.2d at 1168. The Nekolny Court applied Mount Healthy to properly protect the rights of the plaintiff, and further stated that this burden was not insignificant, that it was not satisfied by simply showing that he carried the political card of the opposing party or that he favored the defendant's opponent in the election. Nekolny at 1168. This case clearly conflicts with the court's conclusion in Tanner. Nekolny stands for the proposition that the "sole motive" test does not adequately protect the employee, whereas Tanner states that Elrod-Branti, "lie(s) at the extreme of the employee's side...". Tanner at 1014. No clearer conflict can exist between circuits.

The fact that the District Court found in Landry v. Farmer, as stated in Respondent's brief at page eleven, that the Mount Healthy test survived Branti, does not constitute a legal finding of "mixed motive". The Court's decision in Landry in fact rejected any application of a "sole motive" test and thus was not concluding that Landry was a "mixed motive" as opposed to a "sole motive" case. The legal conclusion drawn by the Court regarding the proper allocation of the burden of proof is found in the following paragraph in its opinion:

> ... the Mount Healthy test for proving a First Amendment violation survives Branti. Branti did not address the burden of proof question and the Court does not read it as requiring a plaintiff to prove that he was discharged solely for the reason that he was not affiliated with or sponsored by the political party in office.

564 F.Supp at 604.

The Eighth Circuit, in the instant case, saw no need to apply a "sole motive" test, however it failed to reverse the District Court legal finding of "sole motive" to clarify the law within the Eighth Circuit. Thus, the Eighth Circuit panel appears to be in agreement with the Seventh, First and Fifth Circuits on the burden of proof analysis, however, it was not consistent with the Fifth Circuit on the legal standard applied; it concluded that Pickering was not applicable to this case. The significance of this conflict cannot be overstated. A reading of Tanner and Barnes clearly shows that completely different conclusions were reached in cases with similar facts. In both cases Defendants stated that they had their own people they wanted brought

in; neither Defendant fired all supporters of the opposing candidates, and neither Defendant appointed ardent political supporters to the vacated positions.

Thus, Respondent's assertation that there is no conflict in the decisions of the various circuits, results from an erroneous interpretation of the law. The conflicts are clear. Moreover there is conflict on more than one aspect of First Amendment law. There are differences in the burden of proof applied in the various cases, and differences over the appropriate legal standard.

Clarification of the conflicts in the Circuits also requires that this Court restate the continuing validity of the public's interest in efficient and effective government.

III. THIS COURT MUST SET FORTH THE PROPER ALLOCATION OF THE BURDEN OF PROOF FOR CONSISTENT APPLICATION OF FIRST AMENDMENT LAW

Once the District Court has selected the appropriate test to apply to the facts of the case, confusion still remains over the allocation of the burden of proof. If, for example, the Court determines that the Mount Healthy test is applicable, after the Plaintiff has established a prima facie case what, then is the duty of the Defendant? Is it sufficient for the Defendant to rebut the evidence as presented by the Plaintiff as in Tanner v. McCall, supra at 1190? If so, does the burden then shift back to the Plaintiff to show that Defendant's evidence is pretextual? Or, on the other hand, if Defendant must only rebut the evidence presented by the Plaintiff, must he also go forward and show that the

Plaintiff would have been terminated despite the alleged First Amendment infringement, and that the least restrictive means was employed?

In the case at bar, after determining that the "sole motive" test would be applied, the District Court stated:

> Plaintiffs must make out a prima facie case by proving that political reasons were the sole factor behind their discharge. The burden of going forward with evidence then shifts to defendants who may show 1) that plaintiffs would have been discharged in any event for other reasons, or 2) that political affiliation is an appropriate requirement for plaintiff's former positions. (citation omitted)

568 F. Supp. at 1409-10.

Thus, the District Court below required that the Defendant go forward with the evidence rather than simply rebut that offerred by the Plaintiff.

Neither Elrod nor Branti addressed the burden of proof question. Thus, answers to these questions are necessary to further clarify the respective burdens on the Plaintiff and Defendant in these cases.

IV. THE PRINCIPLES OF DEMOCRACY CAN ONLY BE UPHELD IF THE COURT GIVES SOME DEFERENCE TO THE WILL OF THE ELECTORATE

The campaign platform of Petitioner Bosley was to bring sound management and efficiency to the Clerk's office. Petitioner was elected to office with this mandate, and in an effort to carry it out, terminated four employees out of two hundred and twenty. Petitioner did not dismiss even five percent of the employees of the Clerk's office. Thus it is clear that Petitioner used the least restrictive means to carry out this mandate.

The fact that the least restrictive means was not used by the parties in Branti and Elrod must limit the application of the Elrod-Branti test in cases where the governmental executives have used the least restrictive means. This is particularly significant where the office holder has the aim of improving governmental efficiency, in such cases, the First Amendment Rights of the employees must yield to this vital interest in government. Pickering v. Board of Education, supra at 568; Buckley v. Valeo, 424 U.S. 1.

The Eighth Circuit, by refusing to apply the Pickering balance test, ignores the administrative goal of efficient government and the method through which the goal was attained--the least restrictive means. The Eighth Circuit and all others must follow the lead of

the Fifth Circuit and apply the Pickering balance test and thus, employ a case-by-case approach to examine whether there was a vital interest in government executed through the least restrictive means.

The application of the Elrod-Branti test by the District Court below, precludes Petitioner from carrying out this vital interest of government. The court has placed the constitutional rights of four individuals above those of the citizens of St. Louis. This interpretation threatens the democratic values at the heart of this society--political expression through the ballot. As more eloquently stated by Judge Aldisert of the Third Circuit in Loughney v. Hickey:

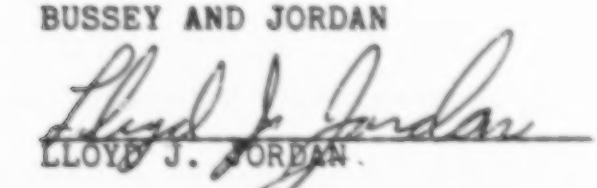
> The Elrod and Branti decisions vaunt intuitive moral values but by absolutizing these values the court has twisted the first amendment into

> an instrument that ruptures the political base of state government. What has been ruptured is not so much the notion of federalism as the basic fabric of a political democracy-effective self-government.

635 F.2d at 1070. The First Amendment rights of the individual must yield to the legitimate means of government. The proper method for balancing the rights of the individual against the needs of government as expressed by the electorate is the Pickering balance test.

Respectfully submitted,

BUSSEY AND JORDAN



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CERTIFICATE OF SERVICE

I, Lloyd J. Jordan, Counsel for Petitioners, do hereby certify that three copies of the foregoing Petitioners' Reply to Respondents' Brief in Opposition were served upon Counsel for Respondents by depositing said copies in the United States mail with first-class postage prepaid on the 11th day of April, 1985, addressed as follows:

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